U.S. DEPARTMENT OF JUSTICE

REPORT OF THE RUBY RIDGE TASK FORCE TO THE OFFICE OF PROFESSIONAL RESPONSIBILITY OF INVESTIGATION OF ALLEGATIONS OF IMPROPER GOVERNMENTAL CONDUCT IN THE INVESTIGATION, APPREHENSION AND PROSECUTION OF RANDALL C. WEAVER AND KEVIN L. HARRIS

JUNE 10, 1994

REPORT

This document contains sensitive and confidential material, including information protected by Fed. R. Crim. P. 6(e), and should be handled accordingly.

I. EXECUTIVE SUMMARY

A. Overview

In February 1993, the Office of Professional Responsibility ("OPR") of the U.S. Department of Justice (the "Department") was informed of allegations made by defense counsel for Randall ("Randy") Weaver and Kevin Harris in the criminal case of United States v. Weaver which was pending in the federal district court in Idaho. Defense counsel alleged that employees of several components of the Department had engaged in criminal and professional misconduct during the investigation, apprehension and prosecution of Randy Weaver and Kevin Harris. The Department decided to defer action on this matter until the criminal trial was completed.

In July 1993, a jury acquitted Weaver and Harris of charges stemming from the murder of a federal officer. Following the acquittal, numerous additional allegations were raised by defense counsel and other sources against the Bureau of Alcohol, Tobacco and Firearms ("BATF"), the U.S. Marshals Service ("Marshals Service"), the Federal Bureau of Investigation ("FBI" or "Bureau") and the U.S. Attorney's Office for the District of Idaho ("USAO"). Included among these allegations were claims that Department employees had unlawfully caused the deaths of Sammy and Vicki Weaver, had taken actions that had obstructed justice, had committed perjury and had engaged in other criminal and ethical misconduct. In late July 1993, attorneys from OPR and the Criminal Division of the Department, assisted by inspectors from the FBI, began an investigation of these allegations.

This report details the results of this investigation and traces chronologically the events that occurred in the Weaver matter. The early sections of the report focus on Weaver's sale of illegal firearms to a BATF informant, BATF's unsuccessful attempt to enlist Weaver as an informant, the subsequent governmental delay in seeking an indictment on the firearms violations, and Weaver's arrest on weapons charges followed by his subsequent failure to appear for trial on those charges. Another area of investigative inquiry focuses on the efforts of the Marshals Service to apprehend Weaver. These efforts culminated in the August 21, 1992 gun battle at Ruby Ridge which took the lives of Deputy Marshal William Degan and Weaver's son, Sammy Weaver. Next, the report contains a discussion of the involvement of the FBI in the Weaver matter, including its initial intervention in the crisis, its responsibility for the death of Vicki Weaver and wounding of Kevin Harris on August 22, 1992, its handling of the crisis including its attempts to end the week-long standoff, its handling of the crime scene searches and its subsequent activities in assisting the USAO in preparing the Weaver case for trial. Finally, the last sections of the report address the handling by the USAO and the investigative

agencies of the prosecution of Weaver and Harris including representations made by the U.S. Attorney to the court prior to the beginning of Harris' preliminary hearing, the conduct of the Assistant U.S. Attorney before the grand jury and the untimely disclosure of critical information to the defense.

We found that many of the allegations of misconduct were not supported by the evidence. However, we did find merit in some of the more serious charges. As a result, we have asked that the appropriate component of the Department examine for prosecutive merit the conduct of the FBI sniper/observer who fired the shots on August 22, 1992. In addition, because our investigation indicated that Assistant U.S. Attorney Ronald Howen took certain questionable actions during the investigation and prosecution of the Weaver case, we have recommended that the Executive Office for United States Attorneys examine our analysis of his conduct and take whatever administrative action it deems appropriate. Finally, we have formulated a series of recommendations that address the problems that we reviewed or uncovered during our investigation.

B. Significant Findings

In October 1989, Randy Weaver sold illegal weapons to a BATF informant. When BATF agents later attempted to enlist Weaver as an informant in their investigation of the Aryan Nations, Weaver refused to cooperate. Seven months later, the government indicted Weaver for the illegal weapons sales. We have found no evidence to support the claim that BATF targeted Weaver because of his religious or political beliefs. Similarly, we found insufficient evidence to sustain the charge that Weaver was illegally entrapped into selling the weapons.

When Weaver was arraigned on the weapons charges in January 1991, he was told that his trial would commence on February 19, 1991. Two weeks later, the court clerk notified the parties that the trial date had been changed to February 20, 1991. Shortly thereafter, the U.S. Probation Office sent Weaver a letter which incorrectly referenced his trial date as March 20, 1991. After Weaver failed to appear for trial on February 20, the court issued a bench warrant for his arrest. Three weeks later, on March 14, a federal grand jury indicted Weaver for his failure to appear for trial. We found that: the government, especially the USAO, was unnecessarily rigid in its approach to the issues created by the erroneous letter; that the USAO improvidently sought an indictment before March 20, 1991; and that the USAO erred in failing to inform the grand jury of the erroneous letter.

From February 1991 through August 1992, the Marshals Service was involved in efforts to apprehend Weaver to stand trial for the weapons charges and for his failure to appear for trial.

These efforts included gathering information about Weaver and developing a plan to arrest him. Based on information that it collected, the Marshals Service learned that for many years Weaver had made statements about his intent to violently confront federal law enforcement officials. As a result, the Marshals Service concluded that Weaver intended to resist violently governmental attempts to arrest him. Thereafter, the Marshals Service investigated and carefully considered alternatives that would enable it to arrest Weaver without endangering his family or law enforcement personnel. It concluded that an undercover operation would be the most prudent way to proceed.

In August 1992, six marshals travelled to an area in northern Idaho known as Ruby Ridge to conduct surveillance of the Weaver residence in preparation for the undercover operation. During the surveillance mission, the Weaver dog discovered the marshals and began to bark. The marshals retreated with the dog, Harris, Randy Weaver and his son, Sammy Weaver, and other family members in pursuit. At an area known as the "Y," a gun battle occurred in which Deputy Marshal Degan and Sammy Weaver were killed.

We conclude that the marshals took a measured approach in developing a plan to apprehend Weaver. Throughout the 18 month period that the marshals were responsible for apprehending Weaver, they carefully devised a plan intended to pose the least amount of risk to Weaver, his family and the marshals. At no time did we find that it was the intent of the marshals to force a confrontation with Weaver or his family. Although some may question the expenditures of manpower and resources by the Marshals Service during this 18 month period, we believe that institutional pressure created by the existence of a bench warrant and an indictment, left the Marshals Service with little choice but to proceed as it did. Moreover, the USAO did little to assist the Marshals Service in this matter. Indeed, during the first part of this process the USAO thwarted the efforts of the Director of the Marshals Service to focus the court on the danger involved in making the arrest and incorrectly terminated efforts by the Marshals Service to negotiate with Weaver through intermediaries.

With regard to the responsibility for the deaths that occurred at the Y, the marshals assert that Harris initiated the fire fight when he shot Deputy Marshal Degan while Weaver and Harris claim that the marshals fired the first shots. After a thorough review of all of the evidence made available to us, we have been unable to determine conclusively who fired the first shot during the exchange of gunfire. Although there is evidence that one of the marshals shot Sammy Weaver during the exchange of gunfire, we found no proof that the shooting of the boy was anything other than an accident. In fact, the evidence indicates that the marshals did not know that Sammy Weaver had been killed

or wounded until his body was discovered by the FBI in a shed outside the Weaver cabin two days later. Nor did we discover any evidence indicating that the marshals attempted to coverup their roles in the incident or that they exaggerated the events to cause a more drastic FBI response than was appropriate.

Soon after learning of the August 21 incident at Ruby Ridge, the FBI officials in Washington, D.C. evaluated the information made available to them and decided to deploy its Hostage Rescue Team ("HRT") to Idaho to deal with the crisis. HRT members assumed their positions around the Weaver compound late in the afternoon of August 22, 1992 but before doing so they were instructed that their conduct was to be governed by specially formulated Rules of Engagement ("Rules"). These Rules instructed the HRT snipers that before a surrender announcement was made they could and should shoot all armed adult males appearing outside the cabin. Operating under these Rules on August 22, an FBI sniper/observer fired two shots in quick succession. The first shot was at an armed adult male whom he believed was about to fire at a HRT helicopter on an observation mission. The first shot wounded Randy Weaver while in front of a building at the Weaver compound known as the birthing shed. The second shot was fired at Harris while Harris was retreating into the Weaver cabin. The second shot seriously wounded Harris and killed Vicki Weaver who was behind the cabin door.

Following this shooting incident FBI officials spent the next eight days attempting to convince Weaver and Harris to surrender to federal authorities. Finally, due largely to the efforts of nongovernmental negotiators, Harris and Weaver surrendered on August 30 and August 31 respectively. Thereafter, the FBI completed its searches of the cabin and surrounding areas. During the following month, the FBI also conducted an internal review of the shooting incident to determine if the sniper had responded appropriately.

Our review found numerous problems with the conduct of the FBI at Ruby Ridge. Although we concluded that the decision to deploy the HRT to Ruby Ridge was appropriate and consistent with Department policy, we do not believe that the FBI's initial attempts at intelligence gathering at the scene were sufficiently thorough. We also found serious problems with the terms of the Rules of Engagement in force at Ruby Ridge. Certain portions of these Rules not only departed from the FBI's standard deadly force policy but also contravened the Constitution of the United States. In addition, we found these Rules to be imprecise and believe that they may have created an atmosphere that encouraged the use of deadly force thereby having the effect of contributing to an unintentional death.

With regard to the two shots fired on August 22, we concluded that the first shot met the standard of "objective

reasonableness" the Constitution requires for the legal use of deadly force but that the second shot did not satisfy that standard. It is our conclusion that the sniper/observer who took the second shot intended to shoot Kevin Harris but accidently killed Vicki Weaver whom he did not see behind the curtained door. We also found the internal FBI review of the shooting incident was not sufficiently thorough and reached incorrect conclusions about the second shot.

Our examination of the command and control of the crisis by the FBI, found numerous shortcomings. These shortcomings included initial inadequacies in utilizing negotiating personnel, communicating with FBI Headquarters, documenting decisions and securing the site.

During and after the crisis, the crime scenes were searched by many law enforcement officials under the direct supervision of the FBI. We found the FBI's handling of the crime scene searches to be inadequate including its failure to use basic crime scene techniques in collecting evidence. Furthermore, the general disorganization and inexperience of some of the participants coupled with inaccuracies in the searches adversely affected the prosecution and contributed to the negative impression of the government generated during the trial. We found no evidence that these deficiencies were intentional or that the FBI staged evidence for the prosecution's benefit.

Shortly after their arrest, separate preliminary hearings were held for Weaver and Harris. While arguing the government's motion requesting a continuance of the Harris preliminary hearing, U.S. Attorney Ellsworth made statements indicating that the government would allow Harris to have a complete preliminary hearing in return for consenting to the continuance. Thereafter, Harris consented to the continuance with the understanding that he would have a full preliminary hearing. An indictment was returned against Harris while his preliminary hearing was in progress. We have found that the U.S. Attorney did not intentionally misrepresent the government's position but that he failed to appreciate the impact of his statements and that he neglected to pay sufficient attention to the information that he received concerning the probable length of the preliminary hearing.

After the first indictments were returned against Weaver and Harris, the Assistant U.S. Attorney continued to present evidence to the grand jury which led to the return of two superseding indictments, each containing a conspiracy count. We found these conspiracy counts to be overly broad and to contain some overt acts for which there was insufficient evidence. With regard to the conduct of the Assistant U.S. Attorney before the grand jury, we found that he acted improperly in a number of instances. On certain occasions, he made improper comments to the grand jury

that bordered on unsworn testimony and introduced evidence of violent acts of racist groups that was at best only tangentially relevant to the charges to be presented to the grand jury against Weaver. Finally, when questioned by the grand jury concerning its jurisdiction to investigate the death of Vicki Weaver, the Assistant U.S. Attorney mistakenly advised them that the matter was not within their jurisdiction. We found that he later failed to correct this error.

Later the USAO decided to seek the death penalty against Weaver and Harris even though the applicable federal appellate court had held that the offense charged could not constitutionally support the imposition of a death sentence. We have concluded that the decision to seek the death penalty, although made in good faith, gave the appearance that the government was overreaching.

From the moment that the USAO began to prepare the case for trial, it met with resistance from the FBI. This resistance took many forms, all of which served to make preparation of the case more difficult. The FBI continuously opposed actions the prosecutors requested to prepare the case for trial, ranging from having the case agents conduct out-of state interviews to enlisting agents from other agencies to help prepare the case. The FBI, which wanted to be the only agency or, at a minimum, the lead agency on the case, resisted working as a coequal member of the prosecution team. Furthermore, when the USAO sought advice and assistance from the FBI Laboratory they met with unjustified delays and resistance that created discord within the team and disrupted trial preparation. These problems contributed to the USAO's decision to retain private forensic experts.

In addition, the FBI unjustifiably delayed producing materials to the USAO that were needed for trial preparation and that were clearly discoverable under federal law and the discovery stipulation signed by the parties. This action unreasonably delayed the availability of these materials for trial preparation and for discovery. Particularly at the headquarters level, we found that the FBI's efforts to locate and produce discoverable documents to be disorganized and incomplete. The late production during trial of material associated with the FBI Shooting Incident Report negatively affected the court's and the jury's perception of the government and the government's case. In addition, the delays in discovery caused by the disorganization of and mistakes committed by the FBI Laboratory contributed to the delay of the trial and to the perception that the government was uncooperative and not being totally forthcoming.

However, the FBI was not alone in failing to make timely disclosure of critical information to the defense. The USAO was also responsible for not promptly revealing certain important

information to the defense. Although in some instances we found these tardy disclosures to be unjustified or negligent, we do not believe that they were improperly motivated or taken intentionally to obstruct the Weaver trial.

C. Significant Recommendations

As the result of our investigation, we have made seven broad recommendations. First, we recommend that all federal law enforcement officers be governed by a standard deadly force policy and that the Department of Justice be responsible for developing such a policy. In addition to specifying clearly the circumstances in which deadly force may be used, the policy should define the occasions in which special Rules of Engagement may be implemented and the process by which such rules should be approved.

Second, we recommend that a crisis response team, including specially trained crisis managers, be available to respond to crises. In addition, we endorse the proposal to include specially trained prosecutors to provide legal support to tactical teams when needed. We also propose periodic joint training exercises by the various federal and local law enforcement agencies which are responsible for responding to crisis situations.

Third, we recommend that a panel comprised of representatives from federal law enforcement agencies, including an attorney from the Department of Justice, be created to examine the internal reviews that law enforcement agencies conduct after shooting incidents occur. This examination would focus of the thoroughness and prosecutive merit of the internal review.

Fourth, we recommend steps be taken to improve the coordination between the FBI and federal prosecutors in responding to discovery. Such steps should include having the Department of Justice develop a policy governing the retention and release of FBI material in criminal discovery and having the FBI denominate a unit to coordinate and monitor discovery.

Fifth, we recommend that FBI field offices that do not have a team in place to recover evidence after major hostage/barricade crises like Ruby Ridge request the assistance of the Evidence Response Team at FBI Headquarters. We further recommend that procedures be adopted to improve the coordination between the FBI Laboratory and the federal prosecutors and that an examination be done of the FBI procedures regarding the memorializing of interviews.

Sixth, we recommend that all U.S. Attorneys' Offices institute a review process for indictments, at least for significant cases.

Finally, we recommend that our findings concerning the events surrounding the shooting of Vicki Weaver on August 22, 1992 be referred to the appropriate component of the Department of Justice to assess prosecutive merit. In addition, we recommend that our analysis of the conduct of Assistant U.S. Attorney Ronald Howen be referred to the Executive Office for United States Attorneys for whatever administrative action it deems appropriate.

II. ORIGINS OF THE INVESTIGATION AND METHODOLOGY EMPLOYED

In February 1993, the Criminal Division of the United States Department of Justice (the "Department") informed the Office of Professional Responsibility ("OPR") of allegations of professional misconduct and criminal wrongdoing by agents of the U.S. Marshals Service ("Marshals Service"), the Federal Bureau of Investigation ("FBI"), the United States Attorney's Office for the District of Idaho ("USAO"), and the Bureau of Alcohol, Tobacco and Firearms ("BATF"), stemming from their involvement in the investigation, apprehension, and prosecution of Randy Weaver and Kevin Harris. Because Weaver and Harris were awaiting trial, OPR in conformity with its normal policy of avoiding interfering with the criminal process, postponed its inquiry until the litigation had concluded.

Following the jury verdict in July 1993, OPR began its inquiry. OPR was aware of numerous allegations of impropriety, some of which had been raised in defense pleadings and many others that arose during and immediately after trial. Allegations by various people and groups -- the media, the trial court, the United States Attorney's Office, the FBI, and U.S. Senator Larry Craig of Idaho, as well as the public -- suggested that personnel of the United States government had engaged in willful misconduct, including obstruction of justice, perjury, and other criminal and ethical violations. As a result, it became apparent that the scope of inquiry needed to be broader than merely issues that had been raised at trial by the defense.

Attorney General Janet Reno announced that the inquiry would include a complete and thorough review of the Weaver case from its inception to the conclusion of the criminal trial. OPR was to conduct this inquiry with investigative support from the FBI.

On July 26, 1993, Michael E. Shaheen, Jr., Counsel in the Office of Professional Responsibility detailed the role of OPR and the FBI in the inquiry in a letter to David G. Binney, Assistant Director of the FBI's Inspection Division. Concerns had been raised about the FBI's ability to be objective and to investigate alleged misconduct by its own agents. Some who had participated in the Weaver investigation and prosecution and had experienced a decided lack of harmony in their working relationship with the FBI, opposed the Bureau's involvement in the investigation. However, OPR's experience with the FBI in investigations in which the FBI was the subject -- including an investigation of its own Director -- demonstrated that the Bureau could be objective under OPR's supervision. Furthermore, the broad scope of the Weaver inquiry and the need for FBI expertise suggested that the Bureau be included in the inquiry.

From the beginning of the investigation OPR attorneys established that they would control the investigation, analyze the information gathered, and make findings and recommendations. The FBI's role was limited to assisting in gathering facts and conducting interviews. The FBI was not to make findings, conclusions, or recommendations.

Due to the expansive scope of the inquiry, former Deputy Attorney General Philip Heymann assigned four attorneys from the Criminal Division of the Department of Justice to assist OPR. It was decided that the review would cover: the conduct of the Marshals Service in its investigation of Randy Weaver from its inception to the conclusion of the trial; the actions of the FBI Hostage Rescue Team ("HRT") during the siege of the Weaver residence; the handling of evidence by the FBI Laboratory and its effect on the Weaver trial; and the conduct of the U.S. Attorney's Office in investigating and prosecuting the Weaver case.

OPR contacted the Department of Treasury ("DOT"), which had also received complaints about BATF's conduct and agreed that its Inspector General's Office would investigate that matter. However, it was understood that OPR would address those elements of the BATF investigation that affected the Weaver case and involved Department of Justice employees. To that end, OPR invited DOT to participate in interviews relevant to its investigation and to review material -- other than grand jury testimony -- that would assist its inquiry. Although DOT is preparing a report of its investigation, this report discusses issues involving BATF that affected the Weaver matter.

The FBI initially assigned 15 Inspectors and two administrative support personnel to the Ruby Ridge Inspection Team to work with the five DOJ attorneys. During the first phase of the inquiry, the team developed an investigative focus, established a management system, and attempted to identify, through research and selected interviews, the issues to be addressed. By August 1993, the team had determined the background interviews that needed to be conducted and had identified documents that needed to be reviewed, including case files and supporting materials from the Marshals Service, the USAO, and the FBI.

Initially, the investigators used a research system consistent with a typical FBI investigation. However, they soon realized that a thorough review of the Weaver matter would benefit from the support of the FBI's Rapid Start team of the Information Resources Division of FBI Headquarters. Rapid Start is a mobile group of FBI employees who provide information management services to major cases. The Rapid Start team developed an automated case management system to assist the investigators in capturing, storing, and retrieving information.

The team also assisted the investigation in tracking leads and with document control.

As Phase I of the investigation entered its final stages, it became apparent that the volume of material to be reviewed and the broad scope of the inquiry would require more personnel and time than had originally been contemplated. A decision was made to increase the size of the investigative team. Thus, when Phase II of the investigation began on September 21, 1993, the Ruby Ridge Inspection Team was doubled in size to include two full-time Inspectors, 26 Assistant Inspectors, and 10 support personnel.

Phase II was the investigative phase of the project. The inspectors were divided into the four teams. The first team was responsible for issues involving BATF and the Marshals Service. The second and third teams focused on the FBI role in the case including the FBI Laboratory, the FBI's handling of the crime scene, and the actions of the FBI HRT and its Rules of Engagement. The last team examined the actions of the USAO throughout its involvement in the Weaver matter. Each team was comprised of a DOJ Attorney, an inspection team leader, and five or six inspectors. The inspectors were encouraged to coordinate their inquiry with the DOJ attorney. Many interviews involved witnesses who had knowledge of issues being investigated by more than one team. In those instances, inspectors from the other teams either attended the interview, scheduled separate interviews, or submitted preliminary questions to determine whether an additional interview was necessary.

The FBI inspectors and DOJ attorneys conducted over 370 interviews of persons involved in the Ruby Ridge incident, including personnel of local, state, and federal law enforcement agencies, the USAO, the Department of Justice, as well as members of the federal judiciary and nongovernmental witnesses.[1] The interviews were conducted throughout the United States and, in some instances, supplemental interviews were conducted for clarification. Although the majority of the interviews were conducted by FBI inspectors, virtually all significant interviews

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[1] The following groups of people were interviewed: 52 FBI HRT members, 60 Marshals Service Special Operations Group personnel, 41 FBI Special Weapons and Tactics Team members, three BATF agents, eight Marshals Service management personnel, 15 Marshals Service personnel directly involved in the Ruby Ridge crisis, ten FBI Headquarters personnel, four FBI negotiators, 43 Idaho State Police members, 26 members of other agencies, 31 FBI field office personnel, 17 FBI Laboratory personnel, and 30 other persons involved with the prosecution, including personnel from the U.S. Probation Office and the U.S. Attorney's Office.

were conducted jointly by FBI inspectors and DOJ attorneys. In addition, thousands of pages of records and files were reviewed.

Before the interview process began, DOJ and FBI personnel developed a witness notification form describing the scope and purpose of the inquiry. Each witness executed this form before being interviewed. In addition, witnesses were asked to execute waiver forms before statements were taken. In some instances, interviewees were represented by counsel or declined to volunteer information, instead relying on earlier sworn testimony or statements.

On November 8, 1993, then Deputy Attorney General Philip Heymann responded to renewed objections to the investigative role of the FBI in the inquiry. Heymann received the assurance of the attorneys in charge of the inquiry that they would accommodate interviewees who requested interviews outside the presence of the FBI. The attorneys assured these interviewees that the FBI was assisting them in gathering facts but that the final report and its conclusions and recommendations would originate from the DOJ attorneys. However, these interviewees were advised that a record of their interviews would be given to the FBI to assist its inquiry. In addition, we cautioned all those interviewed that the Attorney General might release a version of our final report to the public and, therefore, we could not assure their confidentiality.

On January 19, 1994, the FBI investigators submitted their report of factual findings to the DOJ attorneys. Following the receipt of the FBI report, the DOJ attorneys completed their review of all pertinent materials and wrote a report analyzing the many allegations. The original team of lawyers was assisted by two attorneys from the Criminal Division who provided additional research and analysis. In addition, another OPR attorney assisted in the final stages of the preparation of this report.

This report was structured to be read in its entirety or in isolated sections. The Factual Summary, Chronology, and the Identification of Participants sections are intended to provide a general overview of significant events, which will assist the reader in understanding the detailed discussions that follow. Specific topics are generally arranged in chronological order and contain detailed discussions of the relevant facts, the issues raised and the findings made. Finally, we conclude with a section which sets forth recommendations, most of which are designed to anticipate and avoid the kinds of problems subject to this inquiry. An Appendix accompanies this report, but, because of the volume of source material used in this inquiry, it includes only the most significant documents.

III. FACTUAL SUMMARY

A. The U.S. Marshals Service

In January 1985, the U.S. Secret Service investigated allegations that Randy Weaver had made threats against the President and other government and law enforcement officials. The Secret Service was told that Weaver was associated with the Aryan Nations, a white supremacist group, and that he had a large cache of weapons and ammunition. Weaver had spoken of the world's ending in two years "when [his] home will be under siege and assaulted." Secret Service agents interviewed Weaver, who denied the allegations. No charges were filed.

In February 1985, Weaver and his wife, Vicki, filed an affidavit with the county clerk, giving "legal and official notice that [he] believe[d] [he] may have to defend [him]self and [his] family from physical attack on [his] life" by the FBI.

Weaver came to the attention of the Bureau of Alcohol, Tobacco and Firearms ("BATF") in July 1986, when a BATF informant was introduced to him at a World Aryan Congress. The informant met Weaver several times over the next three years. In July 1989, Weaver invited the informant to his home to discuss forming a group to fight the "Zionist Organized Government," referring to the U.S. Government. Three months later, Weaver sold the informant two "sawed-off" shotguns.

In June 1990, BATF agents approached Weaver to persuade him to become an informant. Weaver refused to become a "snitch," and he was indicted for manufacturing and possessing an unregistered firearm. A warrant was issued for his arrest. BATF concluded that it would be too dangerous for the arresting agents and the Weaver children to arrest Weaver at his mountaintop residence. Instead, in January 1991, BATF agents, posing as stranded motorists, surprised Weaver and his wife when they stopped to offer assistance. Weaver told the arresting agents "nice trick; you'll never do that again."

Weaver was arraigned and was released on a personal recognizance bond. A trial date was set for February 19, 1991. Shortly thereafter, Weaver's wife, Vicki, sent the U.S. Attorney's Office two letters addressed to the servants of the Queen of Babylon, which asserted that "[t]he tyrants blood will flow" and "[w]hether we live or whether we die, we will not bow to your evil commandments."

A U.S. Probation Officer sent Weaver a letter incorrectly referring to a March 20 trial date. Weaver did not appear for the February trial, and a bench warrant was issued for his

arrest. On March 14, 1991, Weaver was indicted for failure to appear for trial.

The matter was referred to the U.S. Marshals Service, which learned that Weaver had attended Aryan World Congresses and that he and his family were constantly armed. Weaver sent a letter to the local sheriff, stating that he would not leave his cabin and that law enforcement officers would have to take him out. The Weavers "felt as though the end [was] near." Weaver was quoted as threatening to shoot law enforcement officers, who came to arrest him. Weaver and his family remained in a cabin, atop an isolated mountain.

Between March 1991 and August 1992, the marshals undertook a series of efforts to convince Weaver to surrender. They also made plans to arrest Weaver without harm to law enforcement officers or the Weaver family, particularly the children. The marshals exchanged messages with Weaver through intermediaries, until the U.S. Attorney directed that all communications go through Weaver's appointed counsel (with whom Weaver would not speak).

Teams from the Marshals Service Special Operations Group ("SOG") conducted surveillance of the Weavers' mountaintop property to devise methods to take Weaver into custody safely. Surveillance cameras were installed and aerial photographs were taken of the property. The marshals observed that Weaver and his children responded to approaching persons and vehicles by taking armed positions over the driveway leading to the Weaver cabin. During this period, Weaver continued to make statements that he would not surrender peacefully and that his family was prepared to defend him.

The Director of the Marshals Service ordered that no action be taken that could endanger the Weaver children. In the Spring of 1992, the marshals developed an undercover plan to arrest Weaver away from his cabin and family.

A surveillance team of six marshals went to the mountain on August 21, 1992 to look for places to station cover teams for the operation. Toward the end of the surveillance mission, one of the Weaver's dogs began to chase three of the marshals. Marshals stationed at an observation post saw Kevin Harris, an associate of Randy Weaver, Weaver, his thirteen year old son, Sammy, and Weaver's daughters, follow the dog. All were carrying firearms.

The marshals retreated. As they approached an intersection of trails known as the "Y," they saw Randy Weaver coming down the trail. They identified themselves and told him to halt, but he turned and ran back up the trail. The dog caught up with Deputy Marshal Cooper. He held the dog at bay with his firearm, but did not shoot for fear of provoking the Weavers. An exchange of

gunfire occurred moments later, resulting in the death of Deputy Marshal William Degan, Sammy Weaver, and the dog.

According to the marshals, the fire fight began when Degan and Deputy Marshal Cooper rose to identify themselves. Kevin Harris wheeled and fired at Degan with a 30.06 rifle. Cooper returned fire and thought he hit Harris, though he had not. Cooper turned his weapon toward Sammy Weaver, but did not fire.

Deputy Marshal Roderick, who was further down the path, heard a shot from his left. Roderick could not see anyone other than Weaver's dog, which was heading in the direction Randy Weaver had gone. When the first shot was fired, the dog turned its head toward the marshals. Roderick feared that the dog would turn and attack him or lead Weaver, Harris, and the others to the marshals. Roderick fired at the dog, killing him.

Sammy Weaver then shot at Roderick, and Roderick dove into the woods. Roderick later found a bullet hole through his shirt, though he was not wounded. Cooper heard the shots to his right. He rose and fired a three-round burst to provide cover fire for himself so that he could get to Degan, who had called for help. Following the last shots, Cooper saw Sammy Weaver run out of view up the trail to the Weaver cabin. He did not think that he had hit the boy.

Randy Weaver and Kevin Harris claimed that they did not know what the dog was chasing, though there is evidence to the contrary. They said that they thought they were pursuing a large animal. They asserted that the first shot fired at the Y was Roderick's attack on the dog, that Sammy fired at Roderick in retaliation, and that Degan and Cooper then shot at Sammy. Harris maintained that the marshals did not identify themselves until the shooting had ended and that he shot Degan to defend Sammy.

Soon after the shooting, the three marshals, who had been at the observation post, ran to the Y. They came under fire along the way. One marshal, a medic, treated Degan, without success. Shortly thereafter, the marshals heard a barrage of gunfire, followed by screaming and crying. After a brief time, two marshals left the hill to seek help. The three surviving marshals maintained their positions out of fear that, if they moved, they would be shot at. They also refused to leave without the body of the slain marshal. They did not receive additional fire, though in the hours that followed they heard shots when an airplane flew overhead.

B. Federal Bureau of Investigation - Deployment of Hostage Rescue Team

As soon as the U.S. Marshals Service received word of Marshal Degan's death and the ongoing situation at Ruby Ridge, they sought and received FBI assistance. The FBI had primary jurisdiction for assaults on federal officers, and its Hostage Rescue Team ("HRT") is seen as uniquely skilled for crises. FBI and Marshals Service Headquarters immediately activated command centers to coordinate communications. Special Agent Eugene Glenn was assigned the command and began to arrange for the personnel and equipment required for the crisis. Concurrently, state and local law enforcement and a few FBI agents who were in the immediate area came to the scene and began securing the area.

The rescue of the marshals was delayed until after dark. A team led by the Idaho State Police reached the marshals at approximately 11:30 p.m., more than twelve hours after the shooting. The rescue effort was ongoing when Glenn arrived and deployed FBI SWAT teams to secure the command post's perimeter. He planned to maintain the status quo until the HRT had arrived. Local law enforcement continued to guard the access road as a crowd of sympathizers and onlookers gathered.

The marshals were successfully removed from the mountain without additional gun fire. Once rescued, they were examined at a hospital and transported to a command post where they were given food and allowed to rest. FBI agents interviewed the marshals, starting the following afternoon.

C. Rules of Engagement and the Death of Vicki Weaver on August 22

While the rescue of the marshals was underway, the HRT advance team was en route to Idaho with the Associate Director of the Marshals Service, who briefed them about Weaver's background, his failure to appear for trial, the underlying weapons charge, and his professed desire to confront the federal government. During the flight, HRT Commander Rogers and FBI Associate Director Potts drafted special Rules of Engagement to address the danger they perceived. When the HRT arrived in Idaho, Rogers briefed them on the situation and the proposed Rules of Engagement. They established a command site, flew reconnaissance missions, and began to make plans to address the crisis.

On the afternoon of the shooting, the U.S. Attorney's Office obtained a search warrant and complaints for Randy Weaver and Kevin Harris's arrest on charges relating to the death of Marshal Degan. Assistant U.S. Attorney Ronald Howen, who was assigned to the case, went to the site. Howen remained until Weaver and Harris surrendered a week later. Howen took no role in developing the Rules of Engagement or drafting operations plans,

but he did participate in crime scene searches, interviews, and negotiations. The Boundary County prosecutor was also present during most of the crisis but was not involved in the operations planning.

According to the HRT plan, communication with the occupants of the Weaver cabin, including a surrender demand, was to take place using armored personnel carriers, which would deliver a telephone to the cabin site. The HRT was concerned that the Weavers or sympathizers might be hiding in the woods and planning an ambush. Therefore, teams of HRT sniper/observers were stationed overlooking the cabin before the carrier drove up the hill. Although FBI headquarters had not approved a tactical operations plan, permission was granted to begin negotiations with the Weavers when HRT agents arrived at their positions.

At 3:30 p.m. on August 22, HRT sniper/observers, along with members of the Marshals Service SOG, began their ascent to the cabin. Before their departure, they were briefed on the Rules of Engagement, which provided that:

1. If any adult male is observed with a weapon prior to the announcement, deadly force can and should be employed, if the shot can be taken without endangering any children.

2. If any adult in the compound is observed with a weapon after the surrender announcement is made, and is not attempting to surrender, deadly force can and should be employed to neutralize the individual.

3. If compromised by any animal, particularly the dogs, that animal should be eliminated.

4. Any subjects other than Randall Weaver, Vicki Weaver, Kevin Harris, presenting threats of death or grievous bodily harm, the FBI rules of deadly force are in effect. Deadly force can be utilized to prevent the death or grievous bodily injury to oneself or that of another.

No shots had been fired since the previous day, but, while the HRT members were moving to positions overlooking the cabin, other observers reported to FBI headquarters that the subjects were outside the cabin. FBI Headquarters reminded the field commander that the Rules of Engagement would apply. By 5:45 p.m., the sniper/observers reached their positions. The engines of the personnel carriers at the command post below were audible. An unarmed, young female ran from the cabin to a rocky outcropping and returned to the cabin. Within a minute, an

unarmed male was seen on the cabin's back deck. About ten minutes later, a helicopter carrying HRT personnel began an observation mission. When the helicopter's engine was started, the female seen earlier and two males ran from the cabin to the outcropping. The last person to emerge was carrying a rifle. Sniper/observer Horiuchi identified him as Kevin Harris.

A few seconds later Horiuchi saw a person he believed to be Harris near an outbuilding known as the "birthing shed." The man appeared to be scanning above and behind the snipers for the helicopter. Horiuchi believed that he was trying to position himself to shoot at the helicopter from the more protected side of the shed. Horiuchi fired one shot as the man suddenly moved along the side of the shed out of sight. When Horiuchi fired, the man's back was toward Horiuchi and the helicopter. Because the man moved unexpectedly, Horiuchi assumed he missed. The man he aimed at was not Harris, but Weaver, who was slightly wounded.

Harris and Weaver have maintained that they had no aggressive purpose in leaving the cabin and that Weaver was opening the door to the shed to look at the body of his son.

After ten or twenty seconds Horiuchi saw the target of his first shot following the other two people as they ran to the cabin. The first two entered the cabin through an open door. Horiuchi fired, aiming slightly in front of the last running man. The bullet went through the curtained window of the open door, fatally wounding Vicki Weaver and seriously injuring Kevin Harris. The sniper testified that he did not know that Vicki Weaver was standing behind the door.

When Commander Rogers, who had been aboard the HRT helicopter, learned of the shootings, he and an FBI negotiator went in a personnel carrier to the cabin to make a surrender announcement and to begin negotiations by leaving a telephone. There was no response. A few hours later, due to deteriorating weather conditions, the snipers left their positions and returned to the command post where Rogers debriefed them. The next morning the snipers returned to their positions. Rogers once again went to the cabin area and issued repeated surrender announcements, which included warnings that the outbuildings would be removed if Weaver failed to comply.

By Sunday evening, there was still no response or indication that the Weavers were going to surrender or negotiate, so the first outbuilding, the birthing shed, was moved. Sammy Weaver's body was discovered in the birthing shed.

Negotiation efforts continued for days, but were unsuccessful. No one from the cabin picked up the telephone, which was on an armed robot outside the cabin. Although the weapon on the robot was not loaded, Weaver reported that he was

afraid that anyone who went outside would be shot. Attempts to intercept conversations inside the cabin were not successful. By Wednesday, no aggressive action had occurred for days, and the events which had preceded the confrontation began to seem less clear. The FBI command received evidence in apparent conflict with the initial impressions about Weaver's background and the circumstances surrounding the shootout. As a result, the FBI command decided to withdraw the special Rules of Engagement and to instate the FBI's standard Deadly Force Policy.

On Wednesday, August 26, Weaver told a negotiator that he wanted to talk with his sister. When she arrived, attempts to communicate with Weaver were frustrated by her inability to hear Weaver. On Friday evening, August 28, Weaver agreed to speak with Bo Gritz, whom Weaver told that the sniper had killed his wife and injured Harris and himself. Two other private citizens assisted Gritz in resolving the standoff. Gritz and a Weaver family friend carried Vicki Weaver's body out of the cabin. On Sunday, August 30, Kevin Harris surrendered. The Weavers surrendered the following day.

Searches of the Y were ongoing during the crisis. After the surrender, the cabin and surrounding area were searched. The FBI also sent a team of inspectors to begin an internal inquiry into the sniper shootings.

D. The Prosecution

After their surrender, Harris and Weaver were placed under arrest and charged with the murder of Deputy Marshal Degan. Separate preliminary hearings to determine probable cause for these charges were begun. Before their preliminary hearings concluded, a grand jury indicted Harris for assaulting and murdering Degan and indicted Weaver for aiding and abetting in Degan's death. Thereafter, the magistrate judges terminated the preliminary hearings of Weaver and Harris. Both defendants pleaded not guilty to all charges. On October 1, 1992, a grand jury returned a superseding indictment charging Weaver and Harris with numerous offenses including conspiracy.[2] On November 19, 1992 a Second Superseding Indictment was returned charging Weaver and Harris with the same offenses as the previous indictment and alleging additional overt acts.

In October 1992 the Marshals Service and BATF provided four agents to assist the U.S. Attorney's Office in preparing the case for trial. During the case preparation process continuous issues arose regarding the cooperation of the FBI in preparing the case

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[2] The indictment charged violations of 18 U.S.C. 2, 3, 111, 115, 371, 933(g)(2), 924(c)(1), 1071, 1111, 1114, 3146(a)(1), 3147, 26 USC 5861(d) and (f).

for trial. Included among these problem areas was the lack of cooperation by the FBI in providing discovery materials to the prosecution and the defense.

On January 8, 1993, on motion by the defense, the February 2 trial date was extended to allow time for the defense to review evidence and the results of FBI Laboratory tests. The defense complained about the government's failure to provide timely access to evidence and documents, and the trial judge admonished the prosecutors to have the laboratory examination completed quickly.

The 42 day jury trial began on April 13, 1993. During the trial, the defendants brought to the court's attention problems they had in obtaining documents and information to which they believed they were entitled under either federal law or a discovery stipulation with the government. The most extreme breach of the stipulation involved the late production of the underlying materials and notes related to the FBI Shooting Incident Report which had been produced as the result of an internal inquiry into the sniper shootings. Although the defendants had received the final Shooting Incident Report before trial, during trial the FBI, in response to a defense subpoena, sent by fourth class mail materials that were not part of the documents that the FBI had produced earlier in discovery. These materials included a drawing Horiuchi made days after the shooting. The drawing arrived in Idaho after Horiuchi had completed his testimony, thus requiring his return for additional testimony. The court fined the government for the attorneys fees incurred by the defendants for the lost trial day.

One of the two prosecutors became ill and did not participate in the final arguments. After deliberating for 20 days, on July 8, 1993, the jury acquitted Weaver and Harris of the murder of Deputy Marshal Degan, the conspiracy charge, and the significant remaining charges. Weaver was convicted on charges of failure to appear for trial and committing an offense while on release. On October 26, 1993, Weaver was sentenced to 18 months incarceration, three years probation and a $10,000 fine. The court issued an Order fining the FBI and criticizing it for its failure to produce discovery materials, its failure to obey orders and admonitions of the court, and its indifference to the rights of the defendant and to the administration of justice.

On December 18, 1993, Randy Weaver was released from incarceration.

IV. SPECIFIC ISSUES INVESTIGATED

A. Investigation of Weaver by Bureau of Alcohol, Tobacco and Firearms

1. Introduction

The events that led to the death of three persons at Ruby Ridge, Idaho in August 1992 and to the subsequent prosecution of Randall ("Randy") Weaver and Kevin Harris had their origin with an investigation by the Bureau of Alcohol, Tobacco and Firearms ("BATF"). Serious allegations have been made about the role of BATF in the Weaver matter. Included among these allegations are that a BATF informant entrapped Weaver into selling illegal weapons; that a BATF reward system created the incentive for the informant to entrap Weaver; and that BATF and the informant tried to conceal this future compensation arrangement from the defense, the court and the U.S. Attorney's Office.[3] It has also been alleged that BATF exaggerated to the U.S. Marshals Service, the U.S. Attorney's Office, and the court the extent of Weaver's involvement with the Aryan Nations and the Order and that federal law enforcement unconstitutionally targeted Randy Weaver for prosecution because of his religious views.[4]

2. Statement of Facts

a. Early Law Enforcement Contacts With Randy Weaver

Randy Weaver first came to the attention of federal law enforcement personnel in 1985 as a result of alleged threats he made against President Reagan, Idaho Governor John Evans, and certain law enforcement officials.[5] The U.S. Secret Service investigated the allegations and interviewed Weaver. During this

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[3] The controversy that erupted at trial concerning the compensation arrangement between BATF and the informant is discussed in Section IV(O) of this report.

[4] [ ] Letter from Senator Larry E. Craig to Lloyd Bentsen, Secretary of the Treasury, July 22, 1993; Letter from Senator Larry E. Craig to Janet Reno, Attorney General, July 23, 1993. The Weavers raised a similar issue during the standoff with the FBI in August 1992. [ ]

[5] [ ]

b7C b6 investigation, it was learned that Weaver[
b7C b6]was associated with members of the Aryan
b7C b6 Nations, a white-supremacist group.[6][

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The Secret Service was also told that Weaver had a cache of weapons, including a number of semi and fully automatic handguns and rifles,[10] and that he had access to explosives and to "an b6 unlimited amount of ammunition."[11][b7C

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b6]Boundary County Sheriff Bruce Whittaker has been quoted as saying that Weaver told him that "the real Jews of the Bible are we white Christians and . . . the false Jews . . . should be eliminated." "Standoff with Police Enters Second Year," San Francisco Examiner, March 27, 1992.

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] Weaver had spoken of the world ending in two years "when my home will be under siege and assaulted."[15]

Secret Service agents interviewed Weaver on February 12, 1985. At that time, he denied threatening the President, the Governor, or churches. He also denied having any affiliation with the Aryan Nations or its members.[16] Weaver said that he had "no time for Aryan Nation's preachers" and that his religious beliefs were "strictly by the bible."[

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15[ ] In a 1983 newspaper interview, Weaver discussed his plan to move to Northern Idaho to live in an isolated hideaway "and survive the coming 'great tribulation.'" The article stated that Weaver, a "former Army Green Beret, [was] developing defense plans that include[d] a 300 yard 'kill zone' encircling the compound." "Survivalist Makes Plans for Time of 'Great Tribulation,'" Waterloo Courier, January 9, 1983, B-1.

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On February 28, 1985, Randy and Vicki Weaver filed a handwritten affidavit with the Boundary County Clerk claiming that persons around Deep Creek, Idaho were conspiring to endanger the Weaver family and to precipitate an attack on Randy Weaver's life. The affidavit alleged that Weaver's "accusers" had made false statements about his connections with the Aryan Nations and his ownership of illegal weapons and that they had wrongfully alleged that he had threatened the President and the Pope. The Weavers also stated that these falsehoods were designed to provoke the FBI into storming their home. Weaver expressed fear that he would be killed or arrested for assault of a federal officer, if he tried to defend himself, and he gave "legal and official notice that [he] believe[d] [he] may have to defend [him]self and [his] family from physical attack on [his] life."[20]

[In May 1985, [

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] Vicki Weaver sent a letter to the Spokane Field Office of the U.S. Secret Service demanding a written apology from the Secret Service.[21]] The federal government never filed

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[20] Affidavit of Randy and Vicki Weaver, February 28, 1985.

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any charges against Weaver for the alleged threats made against the President, the Governor, or others.[22]

b. BATF Contact With Weaver

Weaver first came to the attention of the BATF in July 1986 during its investigation of a series of bombings in Coeur d'Alene, Idaho in which the Aryan Nations was believed to be involved. BATF asked Kenneth Fadeley, a confidential informant, to assist its investigation by obtaining information about people attending an upcoming World Aryan Congress who might be engaged in illegal activities.[23] Thereafter, Fadeley portrayed himself as a weapons dealer who catered to motorcycle gangs and, in this role, managed to be introduced to high level members of the Aryan Nations in Northern Idaho.[24]

In July 1986, Fadeley attended the World Aryan Congress at Hayden Lake, Idaho. During this assembly, Fadeley was introduced to Weaver, who was at that time of no particular investigative significance to BATF.[25]

b6 b7C Six months later, in January 1987, Fadeley met with [ ] who was suspected of significant firearms trafficking. Fadeley wore a hidden tape recorder to this meeting. Randy b6 b7C Weaver accompanied [ ] and although Weaver's name had been mentioned numerous times, Fadeley had not expected Weaver at this b6 b7C meeting.[26] In Weaver's presence, [ ] after suggesting that Fadeley was a government informant, held a gun to Fadeley's head and ran an electronic stud finder over Fadeley's body to

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26 Testimony of Herbert G. Byerly in United States v. Weaver, No. CR-92-080-N-EJL, April 21, 1993, at 8-9 (hereinafter cited as "Trial Testimony").

search for a hidden microphone or recorder. [ ] did not find the recorder.[27] At this meeting, Weaver gave Fadeley no indication that he was predisposed to selling illegal weapons,[28]

[ ].[29]

At the World Aryan Congress in July 1987, Fadeley again met Weaver, who was accompanied by his wife and children. Weaver mentioned to Fadeley that it was a "struggle" to provide for his family. Weaver also declared that he did not trust the leaders of the Aryan Nations and that he did not agree with the actions of Richard Butler, leader of the Aryan Nations.[30] After this contact, Fadeley continued to view Weaver simply as one of the many attendees at the World Aryan Congress.

c. Sale of Weapons by Weaver to BATF Informant

Fadeley and Weaver met again at the July 1989 World Aryan Congress, where Weaver was one of the speakers.[31] Fadeley told Weaver that his gun "business [was] busy." In response, Weaver did not offer to sell Fadeley firearms, but he did invite Fadeley to a house he was renting to discuss forming a group to fight the "Zionist Organized Government," a term used by Aryan Nations members to refer to the U.S. Government.[32] According to Weaver, the proposed group was to include [ ] and [ ], who had been convicted of an explosives violation and had formed an Aryan Nations splinter group in

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[28] Trial Testimony of Kenneth Fadeley, April 20, 1993, at 60.

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[30] Fadeley Trial Testimony, April 20, 1993, at 60-69.

[31] In the interim, Weaver had run unsuccessfully in the Republican primary for sheriff of Boundary County. During his campaign, he promised to enforce only those laws the people wanted, and he distributed cards that said "get out of jail free." Weaver lost the primary, 384 votes to 102. "Survivalist Refuses to Come in From Cold," The Oregonian, October 1, 1991, C8; "Feds Have Fugitive 'Under Our Nose'," Spokesman Review (Spokane), March 1, 1992, A19.

[32] Fadeley Trial Testimony, April 20, 1993, at 45, 82-90.

Montana,[33] was of "continuing investigative interest" to the BATF. After learning of Weaver's plan to include [redacted] in this group, the BATF began to view Weaver as a possible point of introduction to [redacted].[34]

On September 8, 1989, at BATF's request, Fadeley telephoned Weaver and arranged to meet him on October 11.[35] Fadeley did not record his conversations with Weaver during the October 11 meeting. At the meeting, Weaver asked Fadeley how his business was going. Fadeley replied that he was "extremely busy" and that he had sold all his "product." Weaver explained that he would like to assist Fadeley and that [redacted].[36] Weaver then asked what the most popular items were, and Fadeley described the "street" weapons he thought he could sell, including shotguns. In response, Weaver said that he could supply four or five shotguns per week. [redacted] Weaver added that there would be "no paper," that is, the weapons would not have registration documents.[37]

As the two men left the meeting, Fadeley walked to Weaver's truck where Weaver showed Fadeley a shotgun and indicated a spot on the barrel where he thought it could be cut. Fadeley pointed to the weapon and said "about here"[38] [redacted]

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[33] Id. at 103, 112.

[34] [redacted]

[35] Fadeley Trial Testimony, April 20, 1993, at 100-02.

[36] [redacted] See Fadeley Trial Testimony, April 20, [redacted]

[redacted]

[38] Fadeley Trial Testimony, April 20, 1992, at 105.

Following the meeting, Special Agent Herbert Byerly, Fadeley's BATF contact agent, conducted various records checks on Weaver.[40]

On October 13, 1989, Fadeley telephoned Weaver from a BATF office and recorded the conversation to confirm his report of the October 11 meeting. During this discussion, Fadeley and Weaver used agreed upon code words and referred to weapons as [41]

On October 24, 1989, Weaver met with Fadeley, who was wearing a miniature tape recorder and an electronic transmitter. At that time, Weaver gave Fadeley two shotguns, one with a 13 inch barrel, the other with a 12-3/4 inch barrel. Weaver told Fadeley that he had cut the shotgun barrels himself, "[s]itting under a shade tree with a vise and a hacksaw," and added that, "when I get my workshop set up I can do a better job."[42] Fadeley paid Weaver $300.00 for the weapons. When Weaver requested an additional $150.00 for the weapons, Fadeley told him that he would give him the additional money at the next purchase.[43] Fadeley then proceeded to tell Weaver that "[t]here is money to be had, and it looks like [you] did a real nice job". He then asked Weaver, "You figured four or five a

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[39] Byerly Trial Testimony, April [illegible], 1993, at [illegible].

[42] Section 5681 of Title 26 of the United States Code criminalizes the possession of unregistered firearms and the alteration of firearms by anyone not in the business of manufacturing firearms. Section 5845(a) explains that the term "firearms" includes shotguns with barrels of less than 18 inches.

[43] Byerly Trial Testimony, April 20, 1993, at 32-34.

week?" to which Weaver replied, "yeah, or more." Weaver repeated that there would be no paper trail on the weapons.[44]

b6 b7C Fadeley met Weaver again on November 30, 1989 with the intent of arranging a trip to Montana to meet [ ]. At this time, Weaver announced that he had five additional sawed-off shotguns available for purchase. When Fadeley told him that he had not brought enough money to pay for them, [ ] In addition, Weaver told Fadeley that he was not able to go to Montana that day [ ] Fadeley paid Weaver $100 toward the balance of the previous purchase of two sawed-off shotguns.[45] Following this meeting, Byerly instructed Fadeley to have no additional contact with Weaver.[46]

d. Delay in Obtaining Indictment and BATF Efforts to Enlist Weaver as an Informant

[ ] On November 24, 1989, Byerly discussed the Weaver gun sale with [ ] from the U.S. Attorney's Office in Boise ("USAO"). [ ] Five months later, on May 21, 1990, Byerly submitted a case report to the USAO

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[44] [ ] Fadeley Trial Testimony, at 135.

[45] [ ]

[46] Byerly Trial Testimony, April 20, 1992, at 44.

[47] [ ]

recommending that Weaver be prosecuted for the sale of the sawed-off shotguns.[48]

b7C b6 One month later, in June 1990, BATF Agents [redacted] and b7C b6 [redacted] drove to the Weaver property to speak with Weaver to determine if he might be willing to cooperate in their investigation of Aryan Nations members. [redacted]

b5/b7C b6 [redacted]

[redacted] they approached Weaver, identified themselves, [redacted] explained to Weaver that the USAO knew of the illegal weapons sale and that Weaver could help himself by providing information to BATF about the illegal activities of Aryan Nations members. He told Weaver that his assistance would be brought to the U.S. Attorney's attention.[50] At the end of the conversation, Byerly gave Weaver his telephone number and told him that they would wait for Weaver to come to the BATF office to discuss cooperating with them. Weaver responded that he would not become a "snitch."[51]

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[48] [redacted]

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b6 b7C [49] [redacted]

b6 b7C [50] [redacted]

b6 b7C [51] [redacted] Vicki Weaver described this encounter in a letter, dated June 12, 1990, addressed to the "Aryan Nations & all our brethren of the Anglo Saxon Race." She wrote:

> We cannot make deals with the enemy. This is a war against the sons of Isaac. Yahweh our Yashua is our Savior and King . . . . If we are not free to obey the laws of Yahweh, we may as well be dead! Let Yah-Yashua's perfect will be done. If its our time, we'll go home. If it is not we will praise his Separated name!

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.[52] On December 13, 1990, seven months after BATF referred the case to the USAO, a federal grand jury in the District of Idaho indicted Weaver for manufacturing and possessing an unregistered firearm.

e. Arrest and Arraignment of Weaver on Weapons Charges

After the issuance of the arrest warrant, BATF conducted an evaluation of Weaver and concluded that it would be too dangerous to the arresting agents and to the Weaver children for BATF to arrest Weaver at his residence.[53] Therefore, BATF agents decided to carry out a ruse to arrest Weaver by surprise away from his home. On January 17, 1991, two agents, posing as stranded motorists, stopped a pickup camper on a bridge near the Weavers' residence, raised the hood, and pretended to examine the b7C b6 engine.[ ]other BATF Agents, and[b7C b6]hid in the back of the camper. Shortly thereafter, Randy and Vicki Weaver stopped their truck and approached the camper. The BATF agents then surprised Weaver and placed him under arrest. In the process, Weaver attempted to grab one of the agent's sidearms. Later, Weaver told the arresting agents "nice trick; you'll never do that again."[54] After making the arrest, the arresting agents discovered that Weaver had a pistol in his front pants pocket and Vicki Weaver had a revolver in her purse, which she had left in their pickup truck.[55]

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[54] [b6 b7C]

[55] See Pretrial Services Report, United States v. Randall C. Weaver, January 18, 1991.[b6 b7C]

3. Discussion

It has been alleged that BATF singled out Randy Weaver because he shared many of the political and religious beliefs associated with the Aryan Nations, and that BATF entrapped Weaver in order to coerce him to become an informant.[56] We found insufficient evidence to support these claims.

a. The Decision of BATF To Target Weaver

This investigation found no evidence that BATF improperly targeted Weaver because of his religious or political beliefs. Instead, the evidence indicates that BATF became interested in Weaver not because of his personal views but rather because he was acquainted with members of the Aryan Nations, who were suspected of being involved in bombings that had occurred in Northern Idaho. Indeed, BATF, which knew of Weaver's beliefs for more than three years before the sale of the shotguns in October 1989, had taken no action to target Weaver for investigative focus during that period. [

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[57] We find nothing improper in the BATF plan.

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[ ]reasons for seeking Weaver's cooperation[59] and find nothing improper about [ ]decision to approach Weaver as a possible source of information about illegal acts committed by members of the Aryan Nations. b7C b6

b. Possible Entrapment by the BATF Informant

Defense counsel have charged that Weaver "was induced by federal authorities" into selling illegal weapons, that is, the government entrapped Weaver into unlawful conduct.[60] To establish the defense of entrapment, it must be shown that the defendant was not predisposed to commit the criminal act.[61] A principal factor in determining whether a defendant was entrapped is whether the defendant evidenced reluctance to commit the offense but was overcome by repeated government persuasion.[62]

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Based on the information available to us, there is no evidence that Weaver proposed or was interested in selling weapons before the October 1989 meeting with Fadeley. Although Fadeley had seen Weaver on a number of occasions with a variety of weapons, Weaver apparently had never said that he wanted to sell guns. Nor is there is any indication that Fadeley repeatedly proposed that Weaver sell weapons to him and that Weaver refused.]

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b6 b7C [59] [ ]

[60] Memorandum in Support of Defendants' Motions, January 6, 1993, at 2 (hereinafter cited as "Defendants' Memorandum").

[61] See Hampton v. United States, 425 U.S. 484, 488 (1976).

[62] United States v. Busby, 780 F.2d 804, 805 (9th Cir. 1986).

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However, Fadeley admitted that he had shown Weaver where to cut the shotgun in response to Weaver's saying, "Just tell me what . . . size [shotgun] and I'll supply what you want."[66]

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,[68] we cannot conclude, on the evidence before us, that Weaver was coerced or unduly enticed into selling weapons to Fadeley.

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[66] Fadeley Trial Testimony, April 20, 1993, at 105:[

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c. Delay in Obtaining Indictment

It has been alleged that Weaver's indictment on weapons charges was delayed so as to give BATF an opportunity to "turn" Weaver, that is, to make him a BATF informant. Although BATF was interested in securing Weaver's cooperation, we have found no evidence that the indictment was delayed to help this effort.

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[In early May 1990, Byerly submitted a case report to the U.S. Attorney's Office recommending that Weaver be prosecuted for the sale of the sawed-off shotguns.] Byerly approached Weaver to seek his cooperation in June 1990.[

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.[70] Seven months later, the matter was presented to a grand jury and an indictment was returned in December 1990.

This investigation has uncovered nothing that suggests misconduct in the span between the weapons sale in 1989 and the indictment in December 1990.[

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] and there is no evidence that the charge was treated as anything but a routine matter.

4. Conclusion

It is our conclusion that the investigation which led to Weaver's indictment for the unlawful sale of two sawed-off shotguns, and the decision to indict were proper. We found no evidence that Weaver was unfairly targeted by BATF at the outset or that the delay in indicting him was improper.[Although we are troubled by the sequence of events which immediately preceded the sale of the shotguns to the confidential informant,] we cannot conclude, based on the evidence before us, that Weaver was coerced or unduly enticed into selling the sawed-off shotguns.

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B. The Failure of Weaver to Appear for Trial

1. Introduction

On January 18, 1991, Randy Weaver was arraigned on the charges that he made and possessed illegal firearms. At that time, the court set February 19, 1991 as the trial date. Several weeks later the court clerk sent a notice to the parties informing them that the trial date had been changed from February 19 to February 20. Two days later, U.S. Probation Officer Karl Richins sent a letter to Weaver in which he erroneously referred to the trial date as March 20, 1991. When Weaver did not appear in court on February 20, the court issued a bench warrant for the his arrest. Almost a month later, on March 14, 1991, while the bench warrant was still outstanding, a federal grand jury returned an indictment against Weaver charging him with failure to appear for trial.

A number of issues have been raised with regard to the conduct of the government in handling this stage of the Weaver matter. These issues include: whether government officials, particularly the U.S. Attorney's Office, knew about the erroneous Richins letter before the court issued the February 20 bench warrant; whether the government responded appropriately to the issues created by the Richins letter; whether the U.S. Attorney's Office erred in presenting the indictment to the grand jury before March 20; and whether the Assistant U.S. Attorney acted improperly by not disclosing the Richins letter to the grand jury.

2. Statement of Facts

a. January 18, 1991 Arraignment

On December 13, 1990, a federal grand jury indicted Randy Weaver for making and possessing illegal firearms.[71] BATF Agent [ ] arrested Weaver on January 17, 1991 and transported him to Coeur D'Alene, Idaho for arraignment. On January 18, [ ] informed Assistant U.S. Attorney [ ] that Weaver had been arrested, that Weaver had resisted arrest, that Weaver had said when arrested, "nice trick; you'll never do that again" and that Weaver appeared to be associated with the Aryan Nation. [

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[71] See 26 U.S.C. §§ 5861(d) and (f).

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[72] [ ]

Weaver appeared in court for his arraignment the following day before U.S. Magistrate Judge Stephen Ayers. No one was present for the government at the arraignment nor was Weaver represented by counsel.[73]

At the arraignment, Judge Ayers discussed the appointment of counsel with Weaver. Weaver consented to the appointment of Everett Hofmeister, who had previously represented him on an unrelated civil matter. Thereafter, Judge Ayers entered a not guilty plea for Weaver and informed him that the trial was set for February 19, 1991 in Moscow, Idaho.[74] Judge Ayers then addressed the issue of pretrial release and decided to release Weaver on certain conditions including that he "appear for all proceedings before this Court. And the next scheduled court appearance is, as I said earlier, your trial in Moscow, on the 19th of February."[75] In addition, Judge Ayers required Weaver to execute an unsecured bond in the amount of $10,000. Judge Ayers explained to Weaver that if he failed to abide by any of the conditions of release, including the obligation to appear for trial, the United States could execute the bond by seizing and selling his real property.[76]

Before releasing Weaver, Judge Ayers instructed him that he was required to report on a regular basis to Karl Richins, the Pretrial Service Officer, in Boise and that his first contact was to be on January 22.[77] Later, Judge Ayers, in order to avoid any misunderstanding, added Richins' name and phone number to the order setting forth the release conditions.[78] Judge Ayers told Weaver that it would be a criminal offense if he failed to appear. Weaver said that he understood the penalties for violating the release conditions and that he agreed to abide by

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[73] [b6 b7C] Accord, Trial Testimony of Stephen Ayers, April 21, 1993, at 26-27.

[74] Arraignment Transcript in United States v. Weaver, No. 90-092-N-HLR, on January 18, 1991, at 6 (hereinafter cited as "Arraignment Transcript").

[75] Id. at 10.

[76] Id.

[77] Id. at 12.

[78] Id. at 18.

those conditions. Thereafter, he signed and received a copy of the release conditions.[79] Weaver also signed a bond and the court explained that the bond could be executed if he failed to appear for trial.[80] Before terminating the proceeding, Judge Ayers had Weaver confirm that his mailing address was Box 103 in Naples, Idaho.[81]

b. Events Occurring From the Arraignment Through February 20, 1991

(1) Communications With Weaver

On January 22, 1991, four days after the arraignment, Judge Ayers sent a letter to Everett Hofmeister informing him that he had been appointed as defense counsel for Weaver, that Weaver could be contacted at "PO Box 103, Naples, Idaho 83847" and that the trial date was set for February 19, 1991. A copy of this letter was sent to Weaver. On that same day, Weaver telephoned Karl Richins, the U.S. Probation Officer, and informed Richins that he had been ordered to call Richins on that date. Richins told Weaver that he had not received the paperwork on his case and, thus, could not advise him about the release conditions. Richins asked Weaver to leave his name and phone number so that Richins could call him when he received the case file. According to Richins, Weaver never gave him a phone number where he could be contacted nor could Richins recall what understanding the parties had as to how Richins would contact Weaver in the future.[82] After this conversation, Richins never heard from Weaver again.[83]

On January 29, 1991, defense counsel Hofmeister sent a letter to the two addresses he had for Weaver, requesting Weaver to contact him. Hofmeister sent similar letters to Weaver at these addresses on January 31 and February 5. Around February 5,

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[79] Id. at 15. The Order setting forth the conditions of release reiterated that the next court appearance was on February 19, 1991 and that Weaver had to contact Richins on January 22, 1991. Condition 7(g) required Weaver to "refrain from possessing a firearm, destructive device, or other dangerous weapon." Order Setting Conditions of Release in United States v. Weaver, No. 90-092-N-HLR, January 18, 1991, at 2 (Appendix at 4).

[80] Arraignment Transcript, at 16-17.

[81] Id. at 17-18.

[82] See Trial Testimony of Karl Richins, April 22, 1993, at 27-30.

[83] Id. at 31-32.

Hofmeister contacted individuals who knew Weaver and requested that they instruct Weaver to contact Hofmeister immediately.[84]

Meanwhile, in early February, the court learned that the Weaver trial, which had been scheduled for February 19, would have to be changed to give the participants sufficient travel time following a federal holiday on the preceding Monday. On February 5, the court clerk sent a notice to the parties informing them that the trial was rescheduled for February 20, 1991. Although this notice was not sent directly to Weaver, a copy was sent to and received by Hofmeister.[85]

Two days later, on February 7, 1991, probation officer Richins sent a letter to Weaver at his Naples address. Richins wrote:

> On January 18, 1991, you were released on Pretrial Supervision pending your trial set for March 20, 1991. You contacted our office and I advised you we would be getting back with you as soon as we received the paper work from Magistrate Ayers. I have long ago received the paperwork but have been unable to locate a telephone number where I could contact you. Accordingly, with this letter, I are [sic] requesting you to contact me at 334-1630 as soon as possible. You may call collect if you choose.[86]

(Emphasis added.)

According to Richins, he wrote the letter because he needed to establish pretrial supervision of Weaver and had not heard from Weaver since their January 22 phone conversation.[87] The only explanation that Richins could provide for the erroneous trial date was that it was a typographical error. At trial, Richins expressed regret for the error and testified that he

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[84] Hearing Transcript in United States v. Weaver, No. 90-092-N-HLR on February 20, 1991, at 2-5 (hereinafter cited as "Hearing Transcript").

[85] See Notice dated February 5, 1991, in United States v. Weaver, No. 90-092-N-HLR (Appendix at 7).

[86] See Letter from Karl L. Richins to Randy Weaver, February 7, 1991 (Appendix at 8). There is no indication on the letter that Probation sent copies to any other party.

[87] See Richins Trial Testimony, April 22, 1993, at 32.

placed the date in the letter as part of his effort to get Weaver to contact him.[88] Weaver never responded to Richins' letter.[89]

On February 8, 1991, after receiving the February 5 court notice, Hofmeister wrote another letter urging Weaver to contact him and informing Weaver that the trial date had been changed to February 20. Four days later, having still not heard from Weaver, Hofmeister placed numerous unanswered calls to a telephone number at which Weaver reportedly received messages. In addition, Hofmeister asked individuals who had contact with Weaver to ask Weaver to contact Hofmeister immediately. However, as of the morning of February 20, Weaver had not contacted Hofmeister.[90]

(2) The "Queen of Babylon" Letters and the Threat Assessment by the U.S. Marshals Service

On February 7, 1991, the U.S. Attorney's Office in Boise received two letters signed by Vicki Weaver. The first letter was dated January 22, 1991 -- the same day that Weaver called Richins -- and was addressed to "The Queen of Babylon." It stated in part:

> A man cannot have two masters. Yahweh Yahshua Messiah, the anointed One of Saxon Israel is our law giver and our King. We will obey Him and no others. . . . 'a long forgotten wind is starting to blow. Do you hear the approaching thunder? It is that of the awakened Saxon. War is upon the land. The tyrants blood will flow.'[91]

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b7C The last quote was credited to [ ].

The second letter, dated February 3, 1991, was addressed to "Servant of the Queen of Babylon, Maurice O. Ellsworth, U.S. Attny [sic]" and stated in part:

> Yah-Yahshua the Messiah of Saxon Israel is our Advocate and our Judge.

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[88] Id. at 36-37, 39-41.

[89] Id. at 38.

[90] Hearing Transcript, February 20, 1991, at 2-5.

[91] Letter from Vicki Weaver to the "Queen of Babylon", January 22, 1991 (Appendix at 5).

> The stink of your Lawless government has reached Heaven, the abode of Yahweh our Yahshua. Whether we live or whether we die, we will not bow to your evil commandments.[92]

[.[93] However, because the language in the letters appeared somewhat threatening, requested the U.S. Marshals Service in Boise ("USMS") to conduct a threat assessment of the letters.[94] [95]

After checking with state and local agencies, [96]

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revealed that Weaver had [ ]had attended three Aryan World Congresses[

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[92] Letter from Vicki Weaver to the "Servant of the Queen of Babylon", February 3, 1991 (Appendix at 6).

[93] [ ]

[94] [ ] One of the responsibilities of the United States Marshal Service is to assess the seriousness of threats made against judicial and law enforcement officials.

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a deputy in the Boundary County Sheriff's Office, that Weaver had sent a letter to that office stating that he would not leave his cabin and that law enforcement officers would have to take him out.[103] b6 b7C the Weavers voiced, felt as though the end is near.[104]

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[[106]] the entire Weaver family, including the 12 and 14 year old children, were armed [

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c. February 20, 1991 - The Rescheduled Trial Date

Although the USAO continued preparing the Weaver case for trial, members of that office were beginning to doubt that Weaver would appear for trial. Sometime before February 20, defense counsel Hofmeister told Assistant U.S. Attorney Howen that he had been unable to contact Weaver. Based on this information, the two letters sent by Vicki Weaver and the information developed during the threat assessment, Howen concluded that Weaver would not appear for trial.

Despite the indications that Weaver would not appear for trial, Howen told Byerly that they needed to continue preparing

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for trial. As a cautionary measure, Howen instructed Byerly to be in court on February 19, the original trial date, in case Weaver appeared.[117] [redacted]

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[redacted][118]

On February 20, Howen and defense counsel Hofmeister appeared before U.S. District Court Judge Harold L. Ryan. At that time, Hofmeister told the court that he had been unable to contact Weaver.[119] Hofmeister then detailed the efforts that he had taken to communicate with Weaver. In addition, Hofmeister said that on the weekend before trial his answering service had received no calls from Weaver and that none of the letters he had sent to Weaver -- all of which had been sent by regular mail -- had been returned.[120] Howen told the court that it was his understanding that Weaver had not kept in contact with Pretrial Services as required. He requested that a bench warrant be issued for Weaver's arrest, that his bond be revoked, and that he be taken into custody.[121]

Judge Ryan, after determining that the presentence specialist had no information about whether Weaver had contacted pretrial services, ordered that a bench warrant be issued for Weaver because he had failed to appear for trial.[122] [redacted]

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[117] See Byerly Trial Testimony, on April 20, 1993, at 68.

[118] [redacted]

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[119] [redacted]

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[120] Hearing Transcript, February 20, 1991, at 2-5. Warren Mays testified at trial that the local postal inspector told him on February 21, 1991 that Bill Grider had picked up the mail from the Weaver box for the previous three weeks. See Mays Trial Testimony, April 23, 1993, at 111-12.

[121] Hearing Transcript, February 20, 1991, at 6-7.

[122] Id. at 7.

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d. Discovery of the Richins Letter and the Response of the Government

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] Terrence Hummel, the Chief Probation Officer, of the inquiry. When Hummel retrieved the Richins letter, he discovered that it did, indeed, erroneously refer to the trial date as being on March 20.[125]

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In addition to notifying the court and the Marshals Service, Hummel also informed U.S. Attorney Ellsworth of the Richins letter and sent him a copy.[129] [ ]

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[129] Hummel also discussed the letter with Richins, who was quite concerned about the error. When Richins asked if there was

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[129](...continued)
anything that he could do to correct the mistake, Hummel told him that he had handled the matter and had done everything that he could do. See Richins Trial Testimony, at 46-51.

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Sometime around February 27, Michael Johnson, the U.S. Marshal for the District of Idaho, asked Hummel to send another letter to Weaver informing him of the trial date error and the bench warrant and asking him to contact the pretrial services officer immediately.[138] However, Richins testified that no steps were ever taken to inform Weaver of the mistakes in the letter.[139]

On February 28, Evans met with Ellsworth, Howen and Mays to discuss the failure of Weaver to appear for trial, the Richins letter[140] and the possibility of presenting an indictment to the grand jury.[141]. According to Ellsworth, Evans was concerned

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[137] [ ] Hunt testified at trial that Evans told him that law clerk Martin had informed him that the bench warrant was still in effect and that the Marshals Service "would proceed with our duty." Trial Testimony of David Hunt on May 3, 1993, at 73-75. [

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[138] [ ] [ ]
Hunt Trial Testimony, May 5, 1993, at 9-10.

[139] Richins Trial Testimony, April 22, 1993, at 50-51.

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[140] [ ]

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[141] See Trial Testimony of Maurice Ellsworth, April 22, 1993, at 26-29. [ ] Although Ellsworth did not recall Mays being a participant in this meeting, Mays testified at trial that he was present. See Mays Trial Testimony, May 5, 1993, at 2-3.

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about the impact of the Richins letter and questioned Ellsworth about how the Marshals Service should proceed. After this discussion, Ellsworth replied, "let's go ahead and return the failure to appear indictment. And if Mr. Weaver appears on March the 20th, we may to [sic] have to dismiss it."[142] [

b5/b7C b6 [143]]

Hunt testified at trial that the Richins letter created "a potential here for some reasonable misunderstanding."[144] Hunt explained that if Weaver had appeared on March 20, they had contemplated that dismissal of the indictment was possible.[145] According to Mays, in light of the Richins letter, the position

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[142] Ellsworth Trial Testimony, April 22, 1993, at 30;

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[144] See Hunt Trial Testimony, May 3, 1993, at 66.

[145] Id. at 66-67.

of the Marshal Service was that the bench warrant and the indictment "would be dropped" if Weaver appeared on March 20.[146]

[.[147] In the interim, the Marshals Service continued to gather information about Weaver, in part to determine if contact could be made with him.[148] On March 4, Hofmeister informed Evans that despite numerous phone calls and letters, Weaver had still not contacted him.[149]

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[146] See Mays Trial Testimony, May 5, 1993, at 6-8.

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[148] Hunt Trial Testimony, May 3, 1993, at 66-67.

[149] See Evans Trial Testimony, May 5, 1993, at 63.

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Pages 51-52 of Report have been withheld in their entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552 (b)(7)(C)

[redacted][158] a combination of tactical and nontactical approaches should be considered to apprehend Weaver.

[redacted] He suggested several options including attempting discussions with Weaver by a negotiation team[redacted] or using other intermediaries,[redacted] through whom to negotiate with the weavers.[redacted]

[redacted] there was "the probability that Weaver will open fire on any law enforcement officer or agent or ZOG ("Zionist Organized Government") once they are identified.[159]

[redacted]

[redacted][160]

e. Decision to Present an Indictment to the Grand Jury

U.S. Attorney Ellsworth authorized Howen to present the failure to appear indictment to the grand jury, with the understanding that if Weaver appeared for trial on March 20 they "would possibly have to dismiss the indictment."[161] Ellsworth explained that dismissal would be necessary under those circumstances, "[b]ecause the fact that he showed up would at least create reasonable doubt in my mind and possibly in a juror's mind as to whether or not the erroneous letter had been

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[158] [redacted]

[159] [redacted]

[160] [redacted]

[161] Ellsworth Trial Testimony, April 22, 1993, at 33.

basis for him not showing up February 20th, but showing up on March 20th."[162]

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[162] Id. at 34.

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f. March 14, 1991 Indictment for Failure to Appear

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The grand jury returned an indictment against Weaver on March 14, 1991 charging him with failure to appear in violation of 18 U.S.C. § 3146(a)(1). Howen signed the sealed indictment on behalf of Ellsworth. An arrest warrant was issued on that date.

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3. Discussion

a. Government Knowledge of Erroneous Richins Letter Prior to February 20, 1991

This investigation has found no evidence that anyone in the government, including the USAO, was aware of the error in the February 7 Richins letter until February 26, 1991.

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government officials learned of the error six days after Judge Ryan had issued the bench warrant on February 20, 1991. Consequently, we find no factual basis for the allegation that the existence of the Richins letter was concealed from the court on February 20, 1991.

b. Appropriateness of Governmental Response to the Richins Letter

Four governmental agencies were involved in the Richins letter issue: the federal district court, which issued the bench warrant for Weaver's failure to appear; the federal probation office, which wrote the erroneous letter; the U.S. Marshals Service, which was responsible for apprehending Weaver on the bench warrant; and the U.S. Attorneys Office, which was responsible for prosecuting the firearms charges and for deciding whether an indictment should be presented for the failure to appear charge.

After being informed of the mistake in the Richins letter, there was a flurry of activity by each of these entities. Phone conversations were initiated, meetings were conducted and memoranda were written. The evidence indicates that the immediate reaction of almost all involved was that the letter was significant, although differences of opinion existed as to the impact of the letter and what, if any, actions should be taken.

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Pages 58-59 of Report have been withheld in their entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552 (b)(7)(C)

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]we are troubled by the rigidity of the government's approach and the lack of leadership exhibited by the USAO on this issue.[ ]we do not believe that the response of the government to this letter was illegal or violated Weaver's constitutional rights.[b5

]It was incumbent upon the USAO to have had the Probation Office send an appropriate correction and to have attempted to discuss the matter with the court. Such action would have taken little effort and would have eliminated any question as to whether Weaver was confused.

c. Propriety of Seeking an Indictment on March 14, 1991

Despite the existence of an outstanding bench warrant, the USAO decided to present an indictment to the grand jury charging Weaver with failure to appear.[

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]At the time that it sought the indictment, a bench warrant was outstanding. The USAO had

never received any indication that the court would withdraw the warrant. To the contrary, the court was firmly resolved that the bench warrant was appropriate and should be executed.

Seeking an indictment at the time that the USAO did created an appearance of governmental overreaching.

d. Failure to Inform the Grand Jury of the Richins Letter

Even though the Department of Justice recognizes that federal law does not mandate the disclosure of exculpatory evidence to the grand jury, it is the "internal policy" of the Department to present or disclose exculpatory evidence to the grand jury "under many circumstances," such as "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which

directly negates the guilt of a subject of the investigation."[179]

It is our conclusion that the decision not to introduce evidence of the Richins letter was contrary to Department of Justice policy. One of the elements of the failure to appear charge is that the individual "knowingly . . . fails to appear before a court as required by the conditions of release."[180] Evidence that Weaver might have thought that he was required to appear on another date is in our view "substantial evidence which directly negates the guilt." We think that the inconsistency created by the information in the Richins letter went directly to Weaver's state of mind regarding when he was to appear. Accordingly, we think that [redacted] was obligated to present the Richins letter to the grand jury.[181]

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[179] U.S. Attorneys' Manual § 9-11.233 (1992). Although not binding on Department of Justice Attorneys, the American Bar Association's Standards for Criminal Justice provide that "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense." ABA Standards for Criminal Justice: The Prosecution Function, Standard 3-3.6(b)(3d ed. 1992).

[180] 18 U.S.C. § 3146(a)(1). In United States v. DePugh, 434 F.2d 548, 551 (8th Cir. 1970), cert. denied, 401 U.S. 915 (1969), the Eighth Circuit held that "willful" means that the act is "knowingly done with the purpose of doing that which the statute prohibits," and does not require "knowledge that the act which he does is in violation of the law." Congress intended the word "knowingly . . . to perpetuate the concept of 'willfully' which appear[ed] in the [prior] bail jumping statute . . . as interpreted in United States v. DePugh . . . ." H. Rep. No. 1030, 98th Cong., 2d Sess. 30, reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3215-16.

[181] [redacted]

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[ ] we found no evidence that [ ] failure to introduce the letter was motivated by bad faith [

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4. Conclusion

There is no evidence that members of the USAO, the federal probation office and the Marshals Service intentionally concealed the erroneous Richins letter from the court on February 20, 1991. However, we conclude that the USAO, the probation office and the court should have appreciated the potential impact of the letter and should have pursued simple and straight forward steps to remedy the error. The decision to seek an indictment prior to the March 20 date stated in the letter was unnecessary and created an impression of prosecutorial overreaching. Finally, the failure to inform the grand jury of the Richins letter, although not illegal, violated internal Department of Justice policy.

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C. Efforts by the Marshals Service to Effect the Arrest of Weaver

1. Introduction

It has been suggested that the shooting deaths of Marshal Degan and Sammy Weaver on August 21, 1992 were the result of a scheme by the Marshals Service to assault the Weaver property, or at the least, the result of inadequate planning. This inquiry examined the scope of the Marshals Service investigation between February 1991 and August 1992 and examined the options the marshals considered to effect the arrest of Weaver.

2. Statement of Facts

a. Involvement of the Marshals Service Special Operations Group

b6 b7C [ ] requested the assistance of the Marshals Service Special Operations Group ("SOG").[183] SOG is a voluntary unit in the Marshals Service specifically trained to handle dangerous or complex matters, such as hostage situations involving fugitives.[184] [

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[183] [

b6/b7C b6]

[184] Testimony of Arthur Roderick, Preliminary Hearing, United States v. Weaver, No. MS-3934, September 10, 1992, at 11-13.

[185] [Kahl was head of a militant anti-tax group, Posse Comitatus. He was wanted for a probation violation when U.S. Marshals, along with local authorities, attempted to arrest him. A firefight erupted in which two marshals were killed and Kahl [ ] wounded. Kahl evaded arrest following the shooting, but was later killed in a confrontation with authorities. A local sheriff was also killed. "Radical Tax Protester's Legacy Lives," UPI, July 9, 1983; untitled article by Gordon Hanson, Associated Press, February 14, 1983; [

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188] It was tentatively agreed that an SOG reconnaissance team would travel to Idaho in mid-June to gather information for a plan to arrest Weaver.[189]

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Pages 66-69 of Report have been withheld in their entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552 (b)(7)(C)

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c. Additional Contacts With Intermediaries

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On July 9, 1991, Deputy U.S. Marshal [ ] and Everett Hofmeister, Weaver's appointed counsel, told [ ], a Weaver associate, that if Weaver surrendered, the failure to appear charge might be dismissed.[203]

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[b5/b7C b6 208]

d. Exchange of Surrender Terms

b6 b7C On October 9, 1991, Deputy Marshal [ ] interviewed [ ] b7C b6 who had been observed bringing supplies and mail to the Weaver cabin.[209] b7C b6 [ ] asked [ ] to convey another negotiation offer to the Weavers. A series of exchanges b7C b6 followed. On October 12, 1991, [ ] gave [ ] a letter from the Weavers which stated:

> The U.S. Government lied to me - why should I believe anything its servants have to say . . . . This situation was set up by a lying government informant whom your lawless courts will honor. Your lawless One World Beast courts are doomed. I have appealed to Yahweh's court

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of Supreme Justice. We will stay here separated from you & your lawless evil in obedience to Yahshua the Messiah.[210]

[ ] told Hunt that Weaver did not want to be tried in Idaho "due to the prejudice against those who believed in separation of the white race."[211] According to [ ] Weaver might surrender, if the trial could be moved and if [ ] could remain with Weaver until he was released or sentenced.[212]

Thereafter, the Marshals Service began to formulate a surrender offer. This offer included promises that: the government would not interfere with Vicki Weaver's custody of her children;[213] the Marshals Service would not harass Randy Weaver's family; and the Government would not move to forfeit Randy Weaver's property.[214]

The following day, [ ] delivered a letter from Vicki Weaver, addressed to [ ], that posed a number of questions, including:

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[210] This note was unsigned, but all correspondence (unless otherwise identified) was in Vicki Weaver's handwriting.

[211] In an October 11, 1991 letter to [ ], Vicki Weaver wrote, "Race mixing is against the law."

[ ]

[212] [ ]

[213] [ ]

[214] [ ]

1. Why a government informant or agent cannot be cross-examined by a defense attorney?

2. Why did the U.S. Dist. Judge in Couer D'Alene tell [the Weavers] that <u>if</u> [they] lost [their] case [they] would lose the $10,000 bond to pay the attorney?[215]

3. Why is there a concerted effort to 'set up' for prison or murder all ex-green berets (Special Forces). My husband <u>is</u> an ex-green beret. We know there are those already in prison from 'set ups.' They all went to court expecting justice from the courts of the country they loved. <u>They didn't receive any</u>! . . . .

(Emphasis in original.)

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[216]

e. <u>Post-Negotiation Investigation</u>

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In October 1991 drafted a letter to Weaver, for containing proposed surrender terms. They sent the letter to the USAO for review.[217] rejected the proposal

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[215] Magistrate Judge Ayers had explained to Weaver that he would forfeit the property bond only if he failed to appear for trial. Arraignment Transcript, January 18, 1991, at 10-11.

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[217] Hunt Trial Testimony, May 5, 1993, at 2-9.

> [I] cannot authorize further negotiations or discussions along this line with defendant or his agent for two reasons. First, since the defendant is represented by Everett C. Hofmeister, appointed counsel, all contact with the defendant must be through his lawyer and not by ex parte means. Department of Justice policy and the Cannons (sic) of Ethics prohibit direct or indirect contact with a defendant who is represented by counsel for any negotiation purpose. Second, the . . . areas of proposed negotiation are either not within my power to grant or bind the government, to (sic) broad in their scope, or are the type of matters properly addressed in a plea agreement in exchange for guilty pleas, but not mere surrender.[218]

b6 b7C [ ] the Marshals Service did not send the proposed letter.

b6 b7C Following the termination of negotiations [ ] continued to gather information. [

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There was little activity by the marshals on the Weaver matter through the winter months because the property was snowed in, and surveillance was not practical.[220] However, they continued to receive information about who was visiting the Weaver property.

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On March 1, 1992, the Spokesman Review, a newspaper in nearby Spokane, Washington, reported that Weaver's children were armed and quoted area residents who predicted violence if law enforcement agents attempted to apprehend Weaver. [Allen Jeppeson] was quoted as saying, "They'll lose their lives if they go up there and threaten Weaver" and "he don't want nobody on his mountain."[221]

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On March 4, 1992, Cluff and Evans traveled to [ ] to obtain an update on Weaver's activities and to check on the status of a telephone being installed there at the Marshal Service's expense. Once there, Cluff and Evans decided to drive up the mountain road leading to the Weaver cabin.[222] They were in plain clothes and rode in an unmarked four-wheel drive vehicle. As they proceeded up the mountain road, the marshals found that vehicle noise on the unmaintained road was clearly audible for great distances. When they reached the top of the road, by the entrance to the Weaver property, they saw signs reading, "White Power is Supreme" and "Bow Down to Yahweh."

Cluff and Evans then saw Randy Weaver, armed with a rifle, and a boy and a girl standing above them on a rock formation. The boy also had a rifle. A yellow dog ran up to the vehicle, barking.[223] When Weaver told them they were trespassing, they responded that they were interested in buying property. Weaver told them to return with a realtor. Cluff and Evans left.[224]

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[221] "Feds Have Fugitive 'Under Our Nose'," Spokesman Review (Spokane), March 1, 1992, at A1. On the same day, an article in the Chicago Tribune described Weaver as a "folk hero" holding the Marshals Service at bay. One week later, the story was picked up by the Associated Press, and articles appeared in the New York Times ("Marshals Know He's There But Leave Fugitive Alone," New York Times, March 13, 1992, at A14) and the San Francisco Chronicle ("U.S. Slow to Nab White Supremacist," San Francisco Chronicle, March 13, 1992). On March 27, 1992, the San Francisco Examiner reprinted the March 8, 1992 Chicago Tribune article ("Standoff With Police Enters Second Year, San Francisco Examiner, March 27, 1992).

[222] Evans described the decision to drive to the Weaver property as spontaneous. He said they had no intention of making contact with the Weavers. Evans Trial Testimony, May 3, 1993, at 35.

[223] [ ]

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[224] Id. at 1-2; Evans Trial Testimony, May 3, 1993, at [illegible]

b6 b7C Thereafter [ ] determined that additional reconnaissance b7C was necessary. [ ] had learned of previously unknown trails to b6 the Weaver property and believed it was necessary to explore them.

f. Briefing of the Marshals Service Director

A meeting was held on March 27, 1992 at Marshals Service Headquarters to brief Acting Director Henry Hudson and other officials, [

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b6 b7C At the meeting, [ ] presented a plan for an assault on the Weaver compound, but recommended against taking such action. Hudson agreed that a tactical approach did not appear viable because of their concern for the safety of Vicki Weaver and her children.[225]

As an alternative, Hudson telephoned U.S. Attorney Ellsworth and asked him to consider dismissing the warrant against Weaver and reissuing it under seal. Hudson thought this would relieve the pressure to arrest Weaver and might cause Weaver to believe it was safe to come off the mountain. Hudson explained to Ellsworth that Weaver could then be arrested without launching an assault on the compound and risking injury to the children and to government personnel.

Ellsworth told Hudson [

b5/b7C b6] they could not dismiss the indictment because Judge Ryan was calling for Weaver's arrest.[227] In response, Hudson offered to travel to Boise to meet Judge Ryan, but his offer was not accepted.[228]

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Unable to resolve the matter in this fashion, Hudson ordered that any plan adopted should avoid potential harm to Vicki Weaver and the Weaver children. He believed that a "ruse" arrest would be more likely to achieve this goal than an "operational" strategy.[229]

Thereafter, the Weaver case was transferred to the Enforcement Division and was given the name "Operation Northern Exposure." The primary responsibility for developing a plan was given to Deputy Marshal Arthur Roderick, Branch Chief of the Enforcement Division.[230]

g. Development of Three Phase Operational Plan

b6 b7C After considerable discussion with the Idaho District and Headquarters, Roderick[ ]devised a three phase plan for arresting Weaver. Under Phase I, a team of marshals would assess the feasibility of technical surveillance of the Weaver cabin and property.[231] This would necessitate inspection of the Weaver property to determine the surveillance equipment that could be used.[232] b6 b7C A team[

was assembled to carry out Phase I.[233]]

(1) Phase I

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b5/b7C b6] The team also spent several days conducting surveillance of the Weaver house from the north and west ridges and looking for sites on which to

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mount surveillance cameras. During this process, they observed the Weavers responding to certain noises by running with rifles to a rock ledge that overlooked the driveway.[234]

On one occasion during Phase I, Roderick nearly had an encounter with Kevin Harris. While Roderick was in the woods near the north ridge observation post, he saw Harris ride nearby on a motorcycle and past the unmarked marshal's truck. When Roderick returned to the truck the tires on the truck were flat.[235]

(2) Phase II

b6 b7C On April 13, 1992, Roderick [ ] briefed Acting Director Hudson on the results of Phase I of the plan to arrest Weaver.[236] While Hudson was shown photographs of the area, b6 b7C [ ] described the locations of surveillance cameras, which would provide information about the Weavers' daily routine. Information obtained from the surveillance cameras during Phase II was expected to assist the Marshals Service in developing options for Phase III of the plan, which was the arrest of

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235 Roderick Trial Testimony, May 10, 1993, at 243-44; Roderick Sworn Statement, at 10. Roderick thought that foliage made it impossible for Harris to see them. He also believed that the flat tires may have been caused by something in the road he had struck earlier. Id. at 10.

b5 236 [ ]

Weaver.[237] [redacted] Acting Director Hudson approved Phase II on or about April 13, 1992. [redacted]

On April 18, the marshals installed surveillance cameras on the west ridge and, on April 22, they installed the cameras on the north ridge. Soon thereafter the cameras became operational after a number of technical problems had been solved.[240] The marshals had to make several trips to the camera sites, often in darkness, to bring the heavy batteries needed to power the cameras.[241]

During Phase II, the team also made three trips onto the Weaver property to survey the terrain because little was known about the land surrounding the Weaver cabin. [redacted] Although aerial photographs portrayed the land

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[237] The cameras, which operated on batteries, would provide "real-time" recordings of the Weaver residence and would run during daylight. [redacted]

as flat, it was actually heavily wooded and frequently steep and rugged.

The closest that the marshals got to the cabin was during the third trip in the first week of May.[ ]the "East Trail," which ended behind the Weaver cabin. They then passed some water tanks a few yards from the cabin and worked their way down to the spring house by the lower garden. This was the first time any marshal had circled the Weaver house and viewed the surrounding grounds.

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Video tapes produced from the surveillance cameras during Phase II were sent to Headquarters which had directed the cameras to continue to be operated. Because the batteries were running low, the marshals decided to replace them with solar panels, which were installed on May 1 and 2.[

]A few days later the camera on the north ridge stopped transmitting. Upon investigation, Roderick and two other marshals discovered that the camera equipment had been stolen.[245]

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On April 18, 1992, the Marshals Service was informed that a crew from "Now It Can Be Told," a television program hosted by Geraldo Rivera, may have been shot at while flying over the Weaver property in a helicopter.[246] Two weeks later, Randy and Vicki Weaver were interviewed on May 2, 1992 by Michael Weland, a local newspaper reporter. Vicki said that the mountain had been given to them by "Yahweh" and that "We will not leave our mountain."[247] Weland also quoted Vicki as saying that her family feared that Randy would "be railroaded through the court and once he was gone [the government] would have come in, kicked us off the property and torn this place apart." Randy Weaver was quoted in the same article as stating that: "Right now, the only thing they can take away from us is our life. Even if we die, we win. We'll die believing in Yahweh."[248]

(3) Transition to Phase III

After Phase II of the operation had been completed, Roderick [ ] for capturing Weaver, [ ]

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246 [

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] denied that anyone had shot at the helicopter. "Fugitive: No Surrender," Coeur D'Alene Press, May 3, 1992, at 1. [

247 [ ]

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248 "Fugitive: No Surrender," Coeur D'Alene Press, May [illegible], 1992, at 1.

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Roderick developed an undercover plan to arrest Weaver, which required two marshals to assume the roles of husband and wife and to purchase a plot of land north of the Weaver property. To provide security for the marshals, the land purchase would have legitimate paperwork. In addition, the undercover marshals would clear the property to create the impression that they were authentic purchasers.

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[253] The plan assumed that Weaver would become accustomed to the undercover marshals, leading to an opportunity to arrest him out of the presence of the other family members.

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Roderick was given permission by in late May 1992, to begin preparations for the undercover operation.

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h. Delay in Implementing the Undercover Operation

Roderick was instructed not to put the undercover plan into effect while Hudson's confirmation was pending before the U.S. Senate.[256] In early August 1992, Hudson was confirmed Director of the Marshals Service and gave oral approval of the undercover plan shortly thereafter.[257] Because there had been no surveillance of the Weaver property since May, Roderick thought it necessary for a team to visit the site and update their information.[258]

3. Discussion

A number of allegations has been raised about the conduct of the Marshals Service between February 1991 and August 1992. We examine in this section these allegations.

a. The Initial Response of the Marshals Service to Weaver's Failure to Appear

Before the failure to appear indictment was returned, Judge Ryan issued a bench warrant and directed the Marshals Service to arrest Weaver. Judge Ryan declined to withdraw the warrant when he learned that the Probation Office had sent Weaver a letter with an incorrect trial date. After the indictment was returned,

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Ellsworth rebuffed Hudson's request to dismiss the indictment and return it under seal.

[redacted]

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[redacted][259] this investigation has found that simply leaving Weaver on the mountain, despite its facial appeal, was not an option available to the Marshals Service once charges had been instituted.[260]

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[redacted][262]

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[259] [redacted]

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[260] Sheriff Bruce Whittaker [redacted] was quoted as saying, "It's just as bad for [Weaver] sitting up there on that mountain as if he was sitting in prison somewhere. . . . He's on his own self-imposed house-arrest up there, and it isn't costing anybody any money." "Feds Have Fugitive 'Under Our Nose.'" Spokesman Review (Spokane), March 1, 1992, at A1.

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[261] [redacted]

[262] [redacted]

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Thus, all factors considered, we acknowledge that the Marshals Service had no option but to respond.

Because the Marshals Service had no option but to pursue Weaver's arrest and because that arrest posed possible injury to law enforcement and to the Weavers, it was incumbent on other law enforcement agencies and the court to assist the Marshals Service in resolving the impasse. As we note below, the Marshals Service received little practical assistance from the U.S. Attorney's Office, which also hindered communications with the court.

b. Consideration by Marshals Service of Alternatives to Secure the Arrest of Weaver

The Marshals Service explored many different options for securing Weaver's arrest before settling on a plan in May 1992. The record is replete with discussions of proposals made by different components of the Marshals Service. Its approach was extraordinarily cautious.

Common to each strategy the Service considered was a concern for the safety of the Weaver children and the arresting marshals. For this reason, a tactical approach, that is, an armed raid on the residence, was considered unrealistic by the Idaho marshals as early as March 1991

[263] In March 1992, Director Hudson ruled out any "tactical" or "operational" strategy that did not eliminate the possibility of harm to Vicki Weaver or her children.

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[262](...continued)

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Page 86 of Report
has been withheld
in its entirety
pursuant to
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

b5 [We found no countervailing evidence that Weaver would surrender peacefully. Accordingly, we believe that the wariness of the Marshals Service was justified.

[In addition, we believe that the caution of the Marshals Service also stemmed from its experience with Gordon Kahl, the head of Posse Comitatus. When the Marshals Service attempted to arrest Kahl in 1983, a firefight erupted in which two marshals were killed and Kahl [wounded.[271] [

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[Both the Special Operations Group and Director Hudson asked U.S. Attorney Ellsworth to dismiss the indictment against Weaver and to re-issue it under seal to reduce the pressure to arrest Weaver and to trick him into leaving his property so that he could be arrested without risk to the children. Ellsworth [refused Hudson's request.[274]

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[271] [Kahl evaded arrest and was killed in a second confrontation. A local sheriff was also killed in that conflict. "Radical Tax Protester's Legacy Lives," UPI, July 9, 1983; Untitled article by Gordon Hanson, Associated Press, February 14, 1983.]

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66 67C 66 67C 66 67C66 Beginning in October 1991,[ ]initiated a series of communications with Randy Weaver through various intermediaries,[ ]The marshals and Weaver also exchanged surrender terms. However,[ ]ended these discussions in October 1992, directing that all communication with Weaver be through his counsel.

The "non-tactical" arrest plan that Director Hudson finally approved in the Summer of 1992 was passive almost in the extreme. Indeed, the marshals were willing to wait up to a year for an undercover marshal to gain Weaver's trust. Under this plan, "cover" teams of marshals would arrest Weaver only if he could be taken into custody without harm to his family.[276]

We do not believe that the Marshals Service acted precipitously or unreasonably in developing its plan to arrest Weaver. The Marshals Service examined many alternatives in devising its course of action. Some options were foreclosed by other agencies; others were thought to be too dangerous. The Marshals Service eventually decided to pursue a non-tactical arrest which posed the least threat of physical violence. However, the Marshals Service recognized that with any plan that it considered, a potential risk of violence existed considering Weaver's threats to resist arrest violently.

c. Pressure Exerted on Marshals Service to Arrest Weaver

This investigation also examined whether the manner in which the Marshals Service treated the charges against Weaver was affected by improper, external influences.

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[274](...continued)

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(1) The Court

Judge Ryan issued a bench warrant for Weaver's arrest following his failure to appear for trial. When he learned a week later that Pretrial Services had sent Weaver a letter bearing an incorrect trial date, Judge Ryan declined to withdraw the warrant.[

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[ ] do not believe that the Court exerted undue pressure on the Service,[279] and we have found little or no evidence to the contrary.

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(2) The Media

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In March 1992, an article appeared in the Spokesman Review, a newspaper in nearby Spokane, Washington, marking the one-year anniversary of the bench warrant. The Chicago Tribune published a similar article on the same day, which described Weaver as a "folk hero" holding the Marshals Service at bay.[281]

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[281] One week later, the story was picked up by the Associated Press and articles appeared in the New York Times (March 12, 1992) and the San Francisco Chronicle (March 13, 1992). On March 27, 1992, the San Francisco Examiner ran the Chicago Tribune article.

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(3) The U.S. Attorney's Office

The USAO, in particular U.S. Attorney Ellsworth and [redacted] played a large role in shaping the Marshals Service's approach to arresting Weaver.[redacted]

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[redacted]

(i) Halting Negotiations

b6/b7C In October 1991,[redacted] began a series of communications with Weaver through intermediaries and exchanged b6/b7C terms of surrender with him.[redacted] directed the marshals to discontinue contact with Weaver because he was represented by counsel, thus, effectively foreclosing communication. Although b5/b7C/b6 we are not convinced that these negotiations would have been successful if pursued,[redacted]

b5/b7C/b6 [redacted]

Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct, provide that an attorney shall not communicate with a party represented by counsel, unless the attorney has the consent of counsel or is "authorized by law."[284] The disciplinary rules have long recognized exceptions to the general prohibition against contacts with represented persons such as to determine if the person is in fact represented by counsel or when counsel has been given prior notice of the communication and consents.[285]

b5/b7C/bc [redacted] It was apparent by the Autumn of 1991 that Weaver was not cooperating with his appointed counsel who nine months earlier had told Judge Ryan

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[284] This limitation includes communications made through third parties. See ABA Model Rule 8.4(1).

[285] The Department of Justice has historically authorized limited contacts to determine whether a person believes counsel is representing his or her interests. See Memorandum from Attorney General Dick Thornburgh, "Communication with Persons Represented By Counsel", June 9, 1989.

that he was unsuccessful in contacting Weaver.[286]

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286 Hearing Transcript, February 20, 1991, at 2-6; . Hofmeister had sent four letters to Weaver's post office box advising him of the February 20 trial date and requesting a meeting. Hofmeister did not receive a reply and the letters were not returned. Hearing Transcript at, 2-6.

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287 Letter from Everett Hofmeister, Esq., to Mr. & Mrs. Randy Weaver, July 10, 1991, at 2. This letter was found in the Weaver cabin, with notations, during a search in September 1992.

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(ii) Other Actions

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In March 1992, Director Hudson asked Ellsworth to consider dismissing the warrant against Weaver and reissuing it under seal. Hudson explained that the marshals thought an

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assault on the Weaver residence would pose unacceptable risk of injury to the Weaver children and Marshals Service personnel. Ellsworth[ ]refused to dismiss the indictment, citing Judge Ryan's call for the arrest of Weaver. When Hudson offered to speak to Judge Ryan, Ellsworth did not respond to the offer.

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]we conclude that the delay occasioned by Hudson's confirmation did not cause the need for additional surveillance but rather, at the most, altered the timing of surveillance that would have been necessary to conduct in any event.

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4. Conclusion

The Marshals Service is required by statute to execute arrest warrants. Consequently, once a warrant was issued for Randy Weaver's arrest, the Marshals Service had no choice but to undertake efforts to apprehend Weaver. Faced with Weaver's repeated threats to violently resist arrest, the Marshals Service explored many alternative plans designed to capture Weaver, but to do so without harming Weaver, his family or the arresting officers. We believe that the Marshals Service acted properly and with due caution in pursuing this purpose. Moreover, we found no evidence that the Marshals Service was pressured by outside entities or was improperly motivated in its efforts. We find, however, that the court and the U.S. Attorney's Office did not appreciate the difficulties facing the Marshals Service, and made no effort to assist the Marshals Service in devising a peaceful solution to the problem.

D. Marshals Service Activities Between August 17 and August 21, 1992

1. Introduction

The defendants' attorneys alleged in pretrial motions that the marshals went to the Weaver property on August 21, 1992 to engage the Weavers and to force a violent confrontation.[299] Counsel pointed to several facts, which, they alleged, proved that the marshals intended "something quite in excess of a mere 'reconnaissance mission.'" These alleged suspicious facts included bringing a "suppressed" rifle on the mission and spending "several hours sighting their guns" before the August 21 incident.[300] Counsel also suggested that the marshals initiated the exchange of gunfire on August 21 and that they deliberately killed Sammy Weaver. Finally, there have been allegations that the marshals exaggerated the amount of fire they received at the "Y," that they tried to cover up the death of Sammy Weaver, and that they delayed interviews with the FBI to enable them to coordinate their accounts of the shootings.

2. Statement of Facts

a. Preparation for Surveillance

b6 b7C In August 1992, Roderick [ ] assembled the team which would conduct the surveillance necessary before the undercover plan could be placed in effect. This surveillance team was comprised of Roderick, Cooper, and Deputy Marshals Thomas, Norris, and Hunt.[301] In addition, b6 b7C [ ] requested that an SOG member participate in the surveillance preceding the undercover b6 b7C operation.[302] [ ] selected Bill Degan, Commander of the Northeast Task Force in Boston and a close friend of Roderick and b6 b7C Cooper, to be the SOG representative on the team.[303] [ ]

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[299] Defendants' Memorandum, January 6, 1993, at 3-5.

[300] Id. at 3.

[301] Norris is a medic. [b5 b6 b7C

[302] [ ] b5 b6 b7C

[303] Roderick, Degan and Cooper had been members of SOG. Cooper testified that he and Degan "were like brothers." Cooper Trial Testimony, April 15, 1993, at 15. At the time of the assignment, only Degan was an active SOG member. Id. at 15.

b6 b7C [ ] the purpose of the mission was simply to gather intelligence.[304]

b5 [

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[On August 17, 1992, Degan,[, , ,] and[ ] arrived in Spokane, Washington.[305] Thereafter, the team drove to Sandpoint, Idaho, to set up a command post at the condominium on Schweitzer Mountain that[ ] team had used in April.[

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Roderick decided that the team would survey the Weaver property on Friday, August 21[

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In preparation for the mission, the marshals had acquired three .223 caliber M16 rifles from the Spokane office. Roderick believed that additional weapons were needed and mentioned the shortage to Degan, who had access to additional weapons from a SOG training display in Boston. Roderick told Degan to bring some of the rifles and other equipment with him.[316] Thereafter, Degan shipped a .223 caliber M16A2 Colt Carbine, a "sniper" rifle, a shotgun, and a "suppressed" .9mm Nato Colt Carbine from a display to Spokane. In addition, the team members brought their personal service weapons.[317]

b. Trip of August 21, 1992 to Weaver Property

[At approximately 2:30 a.m. on August 21, 1992, the team left the condominium at Schweitzer Mountain in a van and a four wheel drive Jeep and drove to the residence of [ ]where they left the van. They then drove the Jeep to[ ]where they arrived at approximately 4:30 a.m. and parked the Jeep[ ]

b7C b6

The plan was for the marshals to move under cover of darkness to surveillance positions and then to leave after a few hours of surveillance.[

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] Each marshal was equipped with

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[314](...continued)

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[316] Roderick Trial Testimony, May 20, 1993, at 117.

b6 b7C [317] Roderick Trial Testimony, May 20, 1993, at 119, 122; [ ]

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(continued...)

radios and night vision equipment and wore camouflage tops, pants, and boots. None wore bullet-proof vests, though they were available.[319]

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. They did not bring the sniper rifle Degan had shipped from Boston.[321]

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The marshals left their Jeep and walked up a trail to an area known as the "Y". At that location, the group split into two three-man teams. The first team, the Observation Post ("OP") team, was comprised of Hunt, Thomas, and Norris; the second team, the Reconnaissance ("Recon") team, was comprised of Roderick, Cooper, and Degan.

The OP team left the Y and took the left fork of the trail through a canopy of trees and a fern field. They then turned right and proceeded up the hill to the north switchback road which led to the observation post, which had been located during one of the Phase II surveillance trips. The observation post was approximately 900 feet in elevation above, and one half to three quarters of a mile from the Weaver compound, and was located at a spot on the north ridge referred to as the "white pine tree."[322]

While the OP team was on its way up the mountain, Roderick led Degan and Cooper up the trail from the Y toward the Weaver compound. The team stopped at the edge of a cover of trees about 250 to 300 yards from the entrance to the Weaver driveway. From

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[318](...continued)

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[319] Roderick Trial Testimony, May 20, 1993, at 125, 159; Cooper Trial Testimony, April 15, 1993, at 23.

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[321] Roderick testified that the sniper rifle was inappropriate for a reconnaissance mission. Roderick Trial Testimony, May 20, 1993, at 136.

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there, Roderick pointed out the rock outcropping where the Weavers responded to vehicles and other noises.[323]

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[324] The Recon team returned to tne Y as it was starting to become light.

By now the OP team had reached the observation post.[325] The OP team was equipped with a spotting scope, a still camera and an 8mm video camera. Once in position, the OP team was to watch the Weaver compound while Roderick, Cooper and Degan scouted the area. The two teams maintained contact by radio

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Soon after its arrival, the OP team began to observe activity in the compound. They saw Sammy Weaver and Kevin Harris conduct a security check around the house. During the early morning hours the dogs barked periodically[327]

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[323] Cooper Trial Testimony, April 15, 1993, at 45.

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[326] The radios were attached to the waistband of the marshals' pants. Each radio was equipped with a "surveillance kit," a wire connected to an ear piece, and a microphone which could be attached to the marshals' hands or lapels. Cooper Trial Testimony, April 15, 1993, at 42-43. Each marshal could hear the others as they spoke. Thomas Trial Testimony, June 2, 1993, at 11.

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Thereafter, Roderick, Cooper, and Degan went to join the other marshals at the observation post.[

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]The OP team reported that members of the Weaver family had run to the outcropping several times in reaction to the dogs' barking. On each occasion, the persons running to the outcropping varied, but usually Harris and Sammy Weaver were among them. Norris stated that, using the spotting scope,[

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The Recon team stayed at the observation post briefly and watched the Weaver family with binoculars and spotter scopes. They also discussed different approaches to the property and the layout of the compound, including the various outbuildings and their possible purposes.

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[332]] They found the position near a birch stand on a large rock embedded in a hill some 200 to 250 yards from the Weavers' cabin.[333] Roderick and Cooper then left Degan and crawled down to another rock approximately fifty yards below the first rock.[334] This point lined up with the

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[333] Roderick Trial Testimony, May 20, 1993, at 172-73.

[334] Roderick Trial Testimony, May 24, 1993, at 12, 191.

base of the Weaver driveway, approximately 100 to 150 yards away. Roderick and Cooper observed family members take up positions at the rock outcropping whenever the dogs barked.[335] They also observed their movement back and forth between the outhouse, the cabin, and other outbuildings.

It was at this time that Roderick decided to toss some rocks to test how the sound would carry and to see if the dogs would react.[336] He asked the OP team to observe the results.[337] Roderick then threw the first rock. Roderick, Cooper, and Degan did not hear the first rock hit, and the OP team reported that there was no reaction from the people who were inside the cabin or the dogs in the Weaver compound. Roderick threw a second rock and again no response occurred from the Weaver compound.[338]

Approximately fifteen minutes later, Roderick and Cooper rejoined Degan, and the three backtracked to the "switchback" road. They had spent roughly a half hour at the birch stand observation point. Roderick decided to show Cooper and Degan the garden/spring house area below the house. At that time, they were still looking for places to station cover teams for the undercover operation.[339] [

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[335] Roderick testified that this position was near where he had observed Weaver meet the [ ] in April. Id. at 13.

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[339] Roderick Trial Testimony, May 24, 1993, at 11, 14, 17.

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b5/b7C b6 [341]]

Before proceeding to the garden/spring house area, Roderick informed the OP team of his intention and asked that he be advised of any movement in the compound as they were heading into the "hot" area, which was the marshals' code for the land immediately surrounding the Weaver compound.[343] [

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After receiving this information, Roderick moved forward slowly, followed by Cooper and Degan. He indicated to Cooper and Degan several possible cover team positions. As they were getting ready to leave the spring house area, Thomas radioed that the Weavers were "responding" to an approaching vehicle.[.[345]] The dogs began to bark, and people started to run out of the cabin.[346] [

b5/b7C b6] Vicki Weaver remained in the compound area.[

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Roderick expected that the Weavers would assume their normal defensive positions. He instructed Cooper and Degan to take

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b6 b7C [341]]

b6 b7C [342]]

[343] Roderick Trial Testimony, May 24, 1993, at 20. The marshals agreed to use language designed to make anyone monitoring their communications think that they were with the Forest Service. Cooper Trial Testimony, April 15, 1993, at 66;

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[cover.[348]

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Roderick then saw a large labrador retriever running toward his position, followed by Kevin Harris, carrying a rifle.[352]

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[352] Roderick Trial Testimony, May 24, 1993, at 28; [

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Kevin Harris claimed that, from the intensity of the dog's reaction, he thought that there was "a large animal or a person" in the vicinity.[355] Vicki Weaver wrote in her journal on August 21, 1992:

> Randy, Kevin and Sam go down past the pump house to see what's bothering the dog. He apparently made the servants of the New World Order retreat down Farnsworth Road. They followed the dog part way down[356]

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Roderick told Cooper and Degan that a dog and a man with a rifle were running toward them and that they had to move out.[357]

[356] Roderick took the lead as the marshals fled through the woods. The area was thickly forested, and the marshals made a great deal of noise as they ran.[359] As they fled down the mountain, the marshals stopped several times to determine whether they were being pursued and saw that they were.

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[356] The entry ended abruptly. Journal Entry of Vicki Weaver dated August 21, 1992.

[357] Roderick Trial Testimony, May 24, 1993, at 20.

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[359] Roderick Trial Testimony, May 24, 1993, at 31. Cooper testified that they were trying to escape at that point and were no longer worried about making noise. Cooper Trial Testimony, April 15, 1993, at 65.

During the retreat, Roderick said that the dog might have to be killed because it had picked up their scent.[360] Roderick noted that each time he and the others turned to look, the dog and Harris were closer to them.[

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Roderick was still leading Cooper and Degan when they broke from the woods into the fern field. Roderick chose the fern field because it provided the quickest retreat and allowed them to move with the least noise. At that time, he thought that they could still escape.[364] They ran through the fern field and under the tree canopy. Roderick was farthest from Harris and the dog, with Degan ten yards behind and Cooper another ten yards behind Degan. As Roderick turned to look back, he saw the dog, Harris, and, for the first time in the pursuit, Sammy

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b6 b7C [360]]Cooper decided while they were running that it might be necessary to "take out" the dog. He decided to use the b6 suppressed .9mm for that purpose. Cooper Trial Testimony, b7C April 15, 1993, at 95-96;[ ]

b6 b7C [361]]

[362]]

b6/b7C [363]]

b6 b7C [364]]Roderick testified that while they were running from Harris and the dog, they could have stopped and taken up defensive positions several times. "[I]f we hunkered down low to the ground, the way we were dressed, we probably could have taken them out" at several points along their escape route. They did not, though, because they "were still under orders not to have a confrontation with the Weaver family." Roderick Trial Testimony, May 24, 1993, at 33, 35.

Weaver.[365] Cooper thought that he might have to shoot the dog and stayed behind Roderick and Degan in case that became necessary.[366]

Cooper did not see Harris until after he was through the fern field and into the canopy of trees leading to the Y.[b6 b7C]He urged them to take up defensive positions.[367] The others agreed. Roderick cleared the canopy first and entered the Y. Degan arrived at the end of the canopy and took a position behind a stump approximately three to four feet off the right of the trail.[368]

c. Shooting at the Y

There is a significant difference between the account of the events at the Y given by the marshals and the account provided by Randy Weaver and Kevin Harris.[369] All agree that Harris shot and killed Deputy Marshal Degan and that Deputy Marshal Roderick shot and killed the dog. Although the marshals did not realize until several days later that Sammy Weaver had been shot during the encounter, they agree now that he was wounded in the arm and fatally shot in the back during the exchange of gunfire. However, the sequence of these events, and, in particular, the timing of Sammy Weaver's death, remains contested, as does the identity of the person who shot Sammy Weaver. The events comprising the shootout at the Y occurred very quickly, and the participants' perspectives often blended together and occasionally were in conflict. Thus, the following narrative represents our best effort to present the most accurate chronology of the events that occurred at the Y based on the information provided to us during our investigation.

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[365] Id. at 38.

[366] [b6 b7C]Cooper Trial Testimony, April 15, 1993, at 95-96; [ ]

[367] [b6 b7C]

[368] Cooper Trial Testimony, April 15, 1993, at 104-105.

[369] [b5 b7C b6]

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(1) Account of Cooper and Roderick

When Cooper reached the "water bar" at the entrance to the Y, he saw Randy Weaver through the brush approximately 40 feet away coming down the other trail from the Weaver compound. They looked at each other, and Cooper thought Weaver seemed shocked to see him. At the time, Cooper assumed that Roderick and Degan were covering Weaver and he turned his attention to Harris and the dog, which were still behind him. He yelled at Harris, "Back off, U.S. Marshals," believing that they had been set up for an ambush.[370]

The dog caught up to Cooper, and he held it at bay with his gun. The dog made a 360-degree turn around Cooper, growling and snarling.[371] Cooper decided not to shoot the dog, fearing that if he did so in plain view of Harris, it would precipitate a gunfight, with both Cooper and Degan fully exposed. After circling Cooper, the dog ran past him and headed towards Roderick. Cooper left the trail and dove behind a rock located about fifteen feet behind Degan and to his right. Cooper did not see Randy Weaver again.[372]

Roderick, who was further into the Y, also saw Randy Weaver on the trail leading up to the cabin. Weaver was wearing a camouflage jacket and screamed something unintelligible at Roderick. Roderick yelled, "Stop! U.S. Marshal" at Weaver. Roderick could not tell if Weaver continued up the trail or went into the woods.[373]

Cooper radioed Degan to join him at the "fox hole," but Degan did not respond. He saw that Harris and Sammy were walking directly in front of Degan. Cooper observed Degan squatting on the balls of his feet behind a stump and facing up the trail. Once Harris and Sammy were into the clearing of the Y, six to ten feet past Degan's position, Cooper thought they had escaped detection. Unexpectedly, Degan went up on his left knee, with his weapon on his shoulder and pointed at Harris and Sammy Weaver, and said, "Stop! U.S. Marshal." Cooper, almost

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[370] Cooper Trial Testimony, April 15, 1993, at 106, 251-253; b6 b7C [redacted]

[371] Cooper referred to this as "dancing" with the dog. Cooper Trial Testimony, April 15, 1993, at 264.

[372] Cooper called this position a "fox hole." Cooper Trial Testimony, April 15, 1993, at 107-108; b6 b7C [redacted]

[373] b6 b7C [redacted] Roderick Trial Testimony, May 24, 1993, at 53-55.

simultaneously joined Degan in saying "U.S. Marshal." However, before Cooper finished the command, Kevin Harris, who had his back to Degan, wheeled around and fired at Degan with a 30.06 rifle. Harris was holding the rifle waist-high when he fired.[374] Cooper saw Degan's arm go back as he started to fall. Harris then began to bring his weapon to his shoulder as if he were going to fire again. Cooper, realizing that Degan had been hit, fired a three-round burst at Harris with the "suppressed" .9 mm. According to Cooper, Harris dropped to the ground "like a sack of potatoes." Cooper was convinced that he had hit Harris. Cooper then wheeled his weapon toward Sammy. He could not see whether Sammy had a gun because a tree blocked his view of Sammy's hands. He did not shoot at Sammy because Sammy had not fired at Degan and he did not see Sammy's weapon. Cooper did not think Degan had returned any fire.[375]

Meanwhile, Roderick had moved south down the path. He heard a shot from his left, from the direction he had last seen Cooper, Degan, Harris, and Sammy. Roderick could not determine who had fired the shot or whether it came from a .223 or 30.06 rifle, although he thought it sounded like a heavy caliber weapon.[376] Other than the dog, which was heading toward the path where Randy Weaver had appeared moments earlier, Roderick could not see anyone. When the first shot was fired, the dog stopped and turned its head back toward the marshals. Concerned that the dog would attack or lead Weaver, Harris, and the others toward the marshals if they kept running, Roderick fired once at the dog with his M16 rifle, striking the dog near the base of the spine.[377]

After he shot the dog, Roderick saw Sammy Weaver enter the Y and run up the trail, away from Roderick and toward where Randy Weaver had disappeared. Sammy called Roderick, "a son of a bitch" and shot two rounds at him from a mini-14 rifle. Roderick dove into the woods off the south side of the trail and took

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[375] [ ] Cooper Trial Testimony, April 15, 1993, at 122-34.

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[377] Roderick Trial Testimony, May 24, 1993, at 249; [

cover behind a tree. He received "constant" fire at that position from weapons that sounded like a shotgun, a handgun, and a rifle.[378]

During this same period, Cooper heard two shots to his right and Sammy Weaver yelling "You son of a bitch." He then began taking fire and heard Degan call "Coop, I need you." Cooper told Degan that he would be there "as soon as I can get 'em off our ass."[379] Cooper rose and fired a second, three-round burst in the direction from which he had last received fire in order to provide cover fire for himself as he tried to get to Degan.[380] Following these last shots, Cooper saw Sammy run out of view up the trail to the cabin. Cooper did not think that his shots had hit Sammy Weaver.[381]

When the fire shifted toward Roderick, it allowed Cooper to move to Degan's position.[382] Degan had been hit once in the chest.[383] He was lying on his left side, his arm in the rifle sling, making a gurgling noise. He was conscious, but unable to

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[378] [ ] Roderick said that the shooting sounded "like it was all around us. There was bark and other debris flying as bullets hit the ground around me." Roderick Trial Testimony, May 24, 1993, at 100. [

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[379] Cooper Trial Testimony, April 15, 1993, at 138-39. [

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] At trial, and to this investigation, Cooper insisted that he was misquoted and that he had aimed down the barrel of his rifle. Cooper Trial Testimony, April 15, 1993, at 277-84. [ ]

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] Cooper Trial Testimony, April 15, 1993, at 135-39.

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assist Cooper in moving to a protected position. Within a few moments, Degan lost consciousness and died.[

b6/b7C b6 [384]] He radioed to Roderick that Degan had been hit and needed help.

(2) The OP Team

Norris, Thomas, and Hunt were at the observation post overlooking the Weaver property, while Roderick, Cooper, and Degan were being chased through the woods. Norris heard the announcement, "U.S. Marshal" and then a single shot. Two quick shots followed from, Norris believed, a .223 caliber weapon and then he heard a series of discharges.[385]

Thomas also heard a single shot, which he described as a "heavy caliber." Thomas contrasted the first shot to subsequent fire, which he characterized as "lighter." Hunt told Thomas that he also thought the first shot sounded like a heavy caliber weapon. Thomas glanced at his watch when he heard the first shot and it was approximately 10:30 a.m.[386]

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Hunt, Norris and Thomas then left the observation post to assist the other marshals. They ran to the Y after hearing the shots, they heard yelling from the Weaver property. When Hunt, Norris, and Thomas approached the fern field and turned left into the tree canopy, they received a volley of gun fire from their left side. This gunfire, described as being from different caliber weapons, went over their heads.[

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b6 b7C [385] [ ] Norris Trial Testimony, June 2, 1993, at 53-54, 62-63, 76-77.

b6 b7C [386] Thomas Trial Testimony, June 2, 1993, at 18; [ ]

b6 b7C [387] [ ]

Page 113 of Report
has been withheld
in its entirety
pursuant to
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

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Randy Weaver has also claimed that he went "down to the Y and somebody jumped out in front of me, and yelled something. I headed back toward home, and I heard a shot, and I heard the dog yelp." Harris added, "Somebody shot the dog and, and it just, all the woods exploded with gunfire." Transcript of Interview of Weaver by Tom Brokaw, August 18, 1993, for "Now," NBC News.

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d. Events Following the Gunfire

Roderick, hearing Cooper's call for help, radioed the OP team to send Norris, the medic, to the Y. Roderick was unable to see Cooper or Degan but assumed that they were on the trail above him. After requesting assistance, he dove back out onto the trail in a prone position to assess the situation. As he looked for Cooper or Degan, he heard a rifle shot from his right front side and then felt something pass across his stomach. Roderick heard more shots and ran back into the woods for cover, where he received additional fire. After examining himself, Roderick discovered a bullet hole in his shirt but he was not injured.

Shortly thereafter, Roderick heard movement off to his right in the woods across the road. Cooper told Roderick to toss stones so that Cooper could determine where Roderick was and direct him to Cooper's location. Roderick moved through the thicket toward Cooper and radioed their position to Hunt. Both men heard sporadic gunfire from the direction of the Weaver compound and the fern field.[393]

Meanwhile, Hunt, Norris and Thomas arrived at the Y.[

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Norris, the medic,[ ]attempted to resuscitate Degan.[

.]Norris worked on Degan for a short time before announcing that he was dead.[394] Cooper told Hunt and Norris

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[393] Cooper Trial Testimony, April 15, 1993, at 160;[ ]

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that Harris had shot Degan and that he believed that he had hit Harris.[395] The marshals whispered because noise would bring gunfire in response.[396] They fired no additional shots at the Y.

Shortly thereafter, there was a tremendous discharge of gunshots on the trail to the Weaver house, followed by the sound of male and female voices wailing. The marshals also heard cursing; a woman shout, "Yahweh;" a man yell, "you son of a bitch;" and others scream, "You tried to kill my daddy."[397] At the time the marshals did not know that Sammy Weaver had been shot in the confrontation.

Roderick, Cooper, and Norris waited in the brush with Degan's body while Hunt and Thomas left for help. Four to five hours later, they heard an aircraft overhead and some gunfire.[398] Weather conditions deteriorated as the day

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[395] [ ] Norris Trial Testimony, June 2, 1993, at 71. Thomas did not recall hearing Cooper say he had shot Harris then. He did, however, receive a radio transmission from Cooper saying this about an hour after Thomas reached the [ ] house. Thomas Trial Testimony, June 2, 1993, at 22.

[396] [ ] Roderick Trial Testimony, May 24, 1993, at 122 ("[E]very time the Weavers heard a sound they just unloaded, they would start firing at any noise they heard").

[397] [

] Roderick and Cooper assumed that the uproar meant that Harris had died from wounds received during the exchange of fire. Cooper Trial Testimony, April 15, 1993, at 170, April 16, 1993, at 527; [ ]

[398] Roderick testified that he heard the plane about two hours after Thomas and Hunt had left. Roderick Trial Testimony, May 24, 1993, at 125. See Norris Trial Testimony, June 2, 1993, at 75. [

] Cooper Trial Testimony, April 15, 1993, at 168; [ ]

progressed, and it started to rain.[399] Cooper and Roderick, who decided not to leave without Degan's body, made several attempts to move Degan, but could not.[400] [

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3. Discussion

a. Alleged Intent of the Marshals to Force a Confrontation with the Weavers

This investigation has revealed no evidence that the Marshals went to the Weaver property on August 21, 1992 intending to use deadly force against Randy Weaver or his family. Indeed, the evidence indicates quite the contrary. Months of planning went into formulating the undercover plan, and Director Hudson had explicitly rejected any strategy that might harm Vicki Weaver or her children. We find absolutely no support for the suggestion that Roderick deliberately ignored Hudson's direct orders not to engage the Weavers.[402]

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[399] Cooper characterized conditions as "miserable." Cooper Trial Testimony, April 15, 1993, at 185; [

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(1) The .9mm Weapon

Defense counsel questioned the marshals' selection of firearms, particularly the .9 mm "suppressed" semi-automatic weapon, and implied that the weapon was brought on the mission expressly to shoot the Weaver dog.[403]

At the outset, it should be noted that a "suppressed" weapon is not silent. The suppression mechanism reduces firing noise to approximately one-fifth of the noise absent the mechanism. If the marshals had intended to fire a weapon without detection, the Marshals Service had quieter guns available.[404]

The five surviving marshals insist they had not planned to use the .9mm, or any other weapon, to shoot the Weaver dog. Roderick testified that the marshals would have to neutralize the dogs when it came time to arrest Weaver, but that they only planned to conduct reconnaissance on the August mission.[405]

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[403] Defendants' Memorandum, January 6, 1993, at 4.[

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[405] Roderick considered a number of means of controlling the dogs when the time came to arrest Weaver. Deadly force and various chemical products were among the options. However, Roderick did not finalize a plan because the operation never reached the point when arrest was imminent. Roderick Trial Testimony, May 20, 1993, at 149-52, 154.

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[408] Cooper also said that he decided while they were running that it might be necessary to use the suppressed .9mm to "take out" the dog because it was leading the pursuers to the marshals and endangering their lives.[409]

The .9mm was not used to shoot the dog. Cooper stated that he did not shoot the dog for fear that by doing so in plain view of Harris, it would precipitate a firefight.[410] It was Roderick who shot the dog with his rifle, after hearing a shot fired to his left.

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[411] We do not find the presence of the weapon suspicious and can envision circumstances in which this type of weapon would be important for a surveillance team, such as when dangerous animals could be encountered.[412]

Although we recognize that the decision to bring the "suppressed" weapon on the mission may seem unusual, we are

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[409] [ ] Cooper Trial Testimony, April 16, 1993, at 455-60.[

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[410] [ ] Cooper Trial Testimony, April 16, 1993, at 478.

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] The Marshals Service Firearms Policy provides that firearms may be used against animals "to prevent attack that threatens bodily injury." See Memo by Stanley E. Morris, (former) Director, U.S. Marshals Service, June 10, 1988, at 2.

satisfied that there was no preconceived plan to use it or any other weapon to shoot the Weavers or their dog.[413]

(2) "Zeroing" the Weapons

It is common practice to "zero" or readjust the sights of weapons that have been shipped to ensure that they have not been damaged in transit.[414]

Thursday, August 20, Roderick, Cooper, Degan, Hunt, and drove to the firing range and spent about an hour sighting and testing the weapons.[415]

Defense counsel pointed to the marshals' zeroing of their weapons as evidence that they had planned to confront the Weavers.[416] We found no evidence to support this allegation. The marshals' trip to the firing range was made openly, with several local state and federal law enforcement officials present. Contrary to defense claims, it was not "target practice" for the marshals' benefit but rather was nothing more than a precautionary practice in which the marshals routinely engaged. We do not attribute anything suspicious to this outing.

(3) Presence of a Medic on the Surveillance Team

Defense counsel also alleged that Norris, the medic, was brought on the August 21 mission "in obvious anticipation that someone would be injured."[417] Counsels' statement implies the marshals planned a violent confrontation with the Weavers that day. We find no support for such a contention.

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[415] Cooper Trial Testimony, April 15, 1993, at 32;

[416] Defendants' Memorandum, January 6, 1993, at 3.

[417] Id.

Each prior trip to the Weaver property had medical support.[418] The Weaver cabin is on a remote, heavily wooded mountain, and access to the area is difficult. It is common for a medic to go on an operation under such circumstances.[419]

The marshals also could not ignore the fact that the Weavers were constantly armed and were reportedly hostile to law enforcement. We consider the assignment of a medic to the team to be a responsible precaution under the circumstances and not proof that an assault was planned.

(4) Tossing of Rocks

Defense counsel also alleged that Roderick threw rocks "toward the Weaver house" to taunt the Weaver dogs and to provoke a confrontation.[420] Although Roderick did throw two rocks, we cannot conclude that this was done for the reason counsel posits.

The rocks at issue were thrown at least 15 minutes before the dogs were alerted by the sound of a vehicle. According to Cooper he suggested to Roderick that they toss rocks "to see what the dogs would respond to" because it was important to know which sounds would draw a reaction from the dogs in case a "cover" team member made a noise while moving into position.[421] [

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Roderick distinguished his intent to test for a reaction from the dogs from purposely trying to provoke them. He denied attempting to excite the dogs.[423] Roderick was confident that,

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] We note that Norris did not arrange for the medivac helicopter provided for in the Plan because the team did not anticipate contact with the Weavers. Norris Trial Testimony, June 2, 1993, at 63-66. [ ]

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[420] Defendants' Memorandum, January 6, 1993, at 4.

[421] Cooper Trial Testimony, April 15, 1993, at 66-67, 88. See Thomas Trial Testimony, June 2, 1993, at 17.

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[423] Roderick Trial Testimony, May 24, 1993, at 188-89.

if the Weavers had heard the rocks, they would not have been able to see the marshals and that, if the dogs had reacted, they could not have reached the marshals.[424]

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evidence that it was improperly motivated.[425]]we found no

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b. The Initiation of Gunfire At the Y

The prosecution charged at trial that Harris fired at Degan at the Y and set off the chain of events that led to the deaths

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[424][ ]Roderick Trial Testimony, May 24, 1993, at 190.

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of Degan, Sammy Weaver, and the Weaver dog. The defense countered that it was the marshals, not Harris, who had initiated the gunfire. The jury acquitted Weaver and Harris of all charges that they had assaulted federal officers.

The marshals testified at trial[ ]The Weavers and Kevin Harris did not testify[

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(1) Witness Accounts

Cooper was the only witness who saw Harris shoot Degan. He testified that Harris fired first. Harris admitted that he shot Degan, but claimed that he did so after Roderick had shot the dog. It is not disputed that Harris was carrying a heavy caliber 30.06 rifle.

Roderick could not see Harris fire and could not say whether the first shot came from a .223 or 30.06 caliber weapon, though the shot sounded like it came from a heavy caliber weapon. Thomas and Hunt agree that the first shot sounded like a heavy caliber weapon. Harris and Randy Weaver were the only ones at or near the Y with heavy caliber guns. However, Norris thought that the first shot, and the two that followed, came from a .223. Roderick and Degan were carrying .223 caliber M16 rifles.

Thomas, Hunt, and Norris agree about the sequence of the shots. They heard one, then two shots, in quick succession, followed by a barrage of fire. Cooper said that Harris fired once, and then Roderick twice. Roderick said he heard one shot before he fired once or perhaps twice. The physical evidence indicates Roderick fired only once. Hunt, Norris, and Roderick all stated that they heard Degan and Cooper start to identify themselves just before the first shot. Weaver and Harris gave conflicting versions. Weaver said that one of the marshals called out for him to freeze before there was any gunfire. Harris said that the marshals did not identify themselves until after the gunfire had stopped.

(2) Physical Evidence

An inventory of the marshals' ammunition taken on the early morning of August 22 showed that Hunt, Norris, and Thomas did not fire their weapons during the incident. Roderick fired one shot from an M16 rifle. Cooper fired six shots from the .9 mm weapon.

Degan's weapon had been fired seven times.[427] This appears to be inconsistent with Harris' claim that there was an "explosion of gunfire" from the marshals.[428] We believe that the marshals exercised restraint as to the number of rounds fired. There is no accurate estimate of the number of shots discharged by the Weavers and Harris.[429]

Sammy Weaver was struck twice in the exchange of gunfire. One round hit him in the right arm, near the elbow, traveling from front to back. This bullet also shattered the stock of his rifle. The second and fatal shot hit the boy in the back and passed through his body, exiting after a slight track from left to right.[430]

(3) The First Shot

We are presented with diametrically opposed descriptions of events that occurred at the Y. However, we are sensitive to the fact that the gunfight occurred quickly and that all of the participants were under extraordinary stress during and after the shooting[431] which may have affected the witnesses' perception of events. The physical evidence is inconclusive and provides no assistance in determining who initiated the gunfight, although it is clear that the marshals did not "ambush" the Weavers. Thus, based upon the evidence available, we do not believe we can definitively reconstruct the sequence of fire that occurred at the Y.

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428 Defense counsel likewise described the marshal's fire as "wild." Defendants' Memorandum, at 4.]

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430 Autopsy Report by Mick Mellett, Boundary County Coroner, August 25, 1992, at 4.]

431 Cooper testified that "all these things [are] compressed into a few seconds, it's difficult to remember exactly what happened first." Cooper Trial Testimony, April 15, 1993, at 264.

c. The Shooting of Sammy Weaver

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Dr. Martin L. Fackler testified at trial for the prosecution as an expert in "wound ballistics." Dr. Fackler concluded that the fatal wound was caused by a .9 mm bullet.[433] Dr. Fackler believed the bullet that caused the fatal wound was similar to the silver tipped bullets used in Cooper's weapon.[434]

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Degan's M16 rifle fires a .223 caliber round. None of the marshals saw Degan discharge his weapon, though his gun was fired seven times.[

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[437] Dr. Fackler testified that Degan could have fired his weapon after he had been shot in the chest by Harris, although his accuracy would have been impaired.[438] However, Fackler did not believe that Degan's M16 caused the

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[433] Trial Testimony of Dr. Martin L. Fackler, June 8, 1993, at 127-28, 185-86.

[434] Fackler Trial Testimony, June 8, 1993, at 186.

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b6 b7C [436] [ ]

b6 b7C [437] [ ]

[438] Fackler Trial Testimony, June 8, 1993, at 177, 183.[

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fatal injury, but thought it was possible that the weapon could have caused the wound to Sammy's arm.[439]

Cooper and Roderick last saw Sammy run out of view up the trail. The location where Harris found Sammy's body is unknown because the Weavers moved the body.

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b5/b7C b6 evidence[ ] we have found no intentionally sought to kill or injure Sammy Weaver.

Cooper said that he purposely fired three shots at Harris, after Harris shot Degan and appeared to be preparing to fire at Degan again.[[440]

b5/b7C b6] Cooper then wheeled his weapon toward Sammy and took aim, but did not fire.[441] Cooper next fired a second three round burst, in the direction from which he had received fire, as cover in an effort to reach Degan.[b6 b7C

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Sammy Weaver was shot during a firefight in which he was a participant.[There is no proof, and we do not conclude, that b7C [ ]intentionally aimed the fatal shot at Sammy Weaver. b6 Indeed,]the record demonstrates that the marshals went to great lengths in preparing for their mission to avoid endangering the Weaver children.

d. Allegation the Marshals Attempted to Cover Up the Shooting Of Sammy Weaver

The marshals maintain that they did not know that Sammy Weaver had been killed until they were told about it on Sunday, August 23.[442] Prior to that time the marshals did not believe b6 b7C that Sammy Weaver had been harmed during the encounter.[ ]

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[439] Id. at 183-184.

[440][

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[441][ ]Cooper Trial Testimony, b7C b6 April 15, 1993, at 122-34.

[442] Roderick Trial Testimony, May 24, 1993, at 340[b6 b7C]

[ ] the news that Sammy's body had been discovered in the "birthing" shed on August 22 appeared to surprise the marshals. Before this, the marshals had reported that Sammy had been at the Y when the shooting began, but they did not believe that he had been shot.[444] [ ].[445]

In conclusion, we found no evidence that the marshals took any actions to conceal the death of Sammy Weaver. Indeed, the evidence indicates that it was not until the FBI discovered the body on August 24 that the marshals were even aware that Sammy Weaver had been killed.

4. Conclusion

We are unable to determine who initiated the gunfire at the Y on August 21. [ ] we find that there was no intent on the part of [ ] to harm Sammy Weaver. We also find that the marshals did not attempt to conceal the shooting of Sammy Weaver since they were unaware that Sammy Weaver had even been injured.

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[444] [ ]

E. Activation of FBI Hostage Rescue Team and Swat Teams on August 21, 1992 and Initial Intelligence Gathering

1. Introduction

Soon after the U.S. Marshals Service Headquarters learned of the shooting at Ruby Ridge it contacted FBI Headquarters officials. A decision was made to deploy the FBI Hostage Rescue Team ("HRT") to Ruby Ridge. Allegations have been made that the deployment of the HRT on August 21 was based on false information about the dangerousness of Randy Weaver, the situation at Ruby Ridge and the August 21 exchange of gunfire. In addition, it has been contended that the activation of the HRT and regional FBI SWAT Teams was an improper, unnecessary, and exaggerated response to the situation. Specifically, critics have suggested that local law enforcement agents, who rescued the marshals, should have been left to resolve the situation and that the U.S. Marshals Service should have remained in charge. There has also been a claim that the federal response was driven by an influential Department of Justice official who had been a close friend of Deputy U.S. Marshal Degan and the Degan family.

Critics have also charged that the FBI failed to assess the situation accurately after the August 21 shooting in large part because they failed to carefully gather and verify information on the background of the Weaver/Harris group and the events that transpired at the Y. The faulty information gathering techniques of the FBI is alleged to have contributed to the subsequent shots fired on August 22, 1992.

2. Statement of Facts

a. The Marshals' Report of The Shooting

Following the shooting at the Y, Deputy Marshal David Hunt, who was familiar with the terrain of the mountain, and Deputy Marshal Joseph Thomas left, at approximately 10:45 a.m. to get aid.[446] b6 b7C

Hunt immediately placed a "911" call for assistance which was received by the Boundary County Sheriff's Office, Bonners Ferry, Idaho, at 11:20 a.m. Hunt told the dispatcher:

> I have an emergency situation on my hands. . . . I got one officer dead. I got (inaudible) pinned down. I need help quick. . . . I want

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the State Police, I want all the help that I can get. I gotta go back in for more officers that are trapped.[447]

Next, Hunt called Marshals Service Headquarters in Washington, D.C. and told[ ]that before the shooting began, a dog had picked up the marshals' scent and that they had run to avoid the Weavers. Hunt spoke of a "heck of a gunfight," in which Harris killed Degan. Hunt told[ ]that he had not heard any gunfire since leaving the mountain.[448]

[ ][449]]

The Marshals Service Crisis Center ("Crisis Center") was activated under the direction of[,]Deputy Director of Operations, and the Special Operations Group ("SOG") was alerted to deploy.[450][

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[447] Transcript of call by Hunt to "911," August 21, 1992.

[ ]All references to time are given in Pacific Daylight Savings Time.

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[ ]agents from the U.S. Border Patrol, the Boundary County Sheriff's Office, and the Idaho State Police had reached the scene. The Idaho State Police Critical Response Team ("CRT") and the Marshals Service SOG unit were en route.[454]

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Page 131 of Report
has been withheld
in its entirety
pursuant to
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

b. Decision to Deploy the HRT

The FBI's involvement in the Idaho crisis began when U.S. Marshals Service Director Henry Hudson told FBI Associate Deputy Director W. Douglas Gow that a Deputy U.S. Marshal had been shot and killed in Northern Idaho; that two other deputy marshals remained pinned down, having previously received heavy gunfire from several subjects; and that the Department of Justice had instructed that the FBI would be the lead agency handling the situation.[459]

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When Gow received word of the assault, he called Assistant Special Agent in Charge Richard Rogers, Commander of the FBI Hostage Rescue Team ("HRT"). The HRT is a specialized full-time tactical team, based at the FBI Academy in Quantico, Virginia. Although its original purpose was to handle high-risk terrorist, hostage situations, its mission has evolved to cover a variety of sensitive, high-risk situations.[464] At 4:30 p.m. EDT, Gow told Rogers that a deputy marshal had been shot and killed in Northern Idaho, that other deputy marshals were still pinned down there,

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The HRT is comprised of [ ] with specialized skills and training. The HRT has been utilized in a variety of high risk situations since its formation in 1983, ranging from international antiterrorist operations to prison uprisings, arrest/search operations against white separatist organizations, and hostage situations.

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and that the Marshals Service had requested assistance.[465]

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The FBI was told that a deputy marshal, who had been able to leave the shooting site, had summoned help, that the location of the remaining deputy marshals was unknown, and that radio contact with them was sporadic. [ ] did not know how many people were involved or whether anyone was in the vicinity of the Weaver cabin. They reported that, shortly after the firefight, Weaver or his associates had fired upon an aircraft.

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The Marshals Service personnel also provided background on Weaver, who was described as a white separatist or supremacist, with a possible Aryan Nations affiliation. Weaver was also described as a former member of the U.S. Army Special Forces, trained in the use of explosives and as a survivalist with large numbers of weapons, including shoulder weapons, ammunition, grenades, food, and supplies stored in his remote, mountaintop cabin. It was believed that Weaver knew well the extremely rugged terrain near his cabin. He had told the media that he would not be captured alive and that the only way he would leave his cabin would be to die in a shoot-out. His entire family, including his wife and children, was reported to be heavily armed.[473]

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HRT deployments must be initiated by the Assistant Director of the FBI's Criminal Investigative Division ("CID"). After consulting with FBI Deputy Assistant Director Coulson, Potts decided to deploy the HRT fully.[

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Rogers was notified of the decision to deploy and immediately departed aboard an FBI aircraft. [

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c. Initial Intelligence Gathering and Rescue of the Marshals

HRT Commander Rogers departed for Idaho at approximately 6:30 p.m. EDT on August 21 with an advance team of HRT personnel, including Supervisory Special Agent Stephen McGavin, and Special Agents Lester B. Hazen and Dale F. Carnegie, accompanied by Marshals Service Deputy Director Duke Smith.

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b6 b7C [ ] Idaho State Police CRT, was informed of the incident and proceeded to the command post [ ] After a briefing from Hunt, [ ] decided that the CRT would wait until nightfall to rescue the marshals so as to avoid ambush by the Weavers.[477]

A ten man CRT team, along with Deputy Marshal Thomas, left the command post at approximately 8:30 p.m. PDT (11:30 p.m. EDT).[478] [

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The CRT team secured Degan's body and headed down the mountain. The return was long and difficult due to the extreme darkness and the burden of Degan's body. They returned to the Command Post at 12:46 a.m. PDT.

[When the marshals were rescued [to a hospital at Bonners Ferry, Idaho.[481]

b5/b7C b6 [They were examined briefly at the hospital and then released.[482]

[483]

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b6 b7C Meanwhile, while en route to Idaho, Smith briefed Rogers and the other HRT personnel on the Weaver case.

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Rogers also testified at trial about the impression of the crisis that Smith conveyed:

> Smith said the aggression was on the part of the members of the Weaver family and that Degan . . . and the others were actually pursued while attempting to retreat from Randall Weaver and Kevin Harris and after being observed by those subjects. . . . He told me that the family was heavily armed, they had both pistols and rifles. There was an indication that they might possibly . . . have some armor-piercing ammunition. It was unclear as to whether there were grenades or explosives, because of Mr. Weaver's background in the military. . . . I certainly had the impression that this was a heavily armed group, and based on what he had told me concerning the

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fire-fight breaking out and Marshal Degan dying, it was clear to me that they were willing to use these weapons.[486]

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Rogers said that it was his impression that a firefight was either "still in progress" or there was "intermittent gunfire taking place" or "sporadic gunfire . . . through the evening". He believed that the marshals were still on the mountain and that they could not extract Degan's body.[489] [ ]

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[486] Rogers Trial Testimony, June 2, 1993, at 16-17.

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[489] Rogers Trial Testimony, June 2, 1993, at 18, 184, 187.

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Potts and Coulson relayed to Glenn the information about the crisis situation that the Marshals Service had provided. Prior to Glenn's arrival Hunt had briefed two FBI agents who had responded to the call for assistance. He gave them information on the Weaver family and Kevin Harris, an overview of the morning's events, and a description of Weaver's tactical operations and defensive positions. Hunt told them that Weaver and the others had pulled back to their defensive positions and were preparing for and awaiting the arrival of government agents. Hunt also briefed local law enforcement officials.[491]

When Special Agent in Charge Eugene Glenn arrived in Sandpoint, Idaho, about 7:00 p.m.(PDT), deputies from the Boundary County Sheriff's Office took him and members of the Salt Lake SWAT Team and Technical Agents to a National Guard Armory to be briefed by law enforcement personnel. told Glenn that Randy Weaver was a violent, former Green Beret and explosives expert, who reportedly had a large cache of arms concealed on his property. Because of Weaver's political and religious beliefs, he had separated himself from the community and was living off the land. Weaver was said to have constructed bunkers and fortifications around his home and claimed he wanted to have a showdown or last stand with the federal government. told Glenn that Weaver had stated he would never be taken off the mountain and in fact had not come down for nearly 18 months.[492]

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Glenn was told that Weaver was with at least one or two other people who may also have been present during the exchange of gunfire. He was told that these people, as well as Weaver's entire family, were committed to similar religious and political beliefs, such as white separatism and supremacism and an intense hatred of the federal government.[493]

Following this briefing, Glenn travelled to the Command Post at Ruby Ridge, arriving at approximately 9:30 p.m.(PDT).[

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] They learned that the Marshals Service was reporting that Kevin Harris may have been shot during the shootout. There was a report that the marshals still on the mountain had received sporadic gunfire until after dark.[496]

b6 b7C [ ] provided information about BATF's investigation of Weaver, his arrest, failure to appear, and the entry of the Marshals Service into the case. Weaver was described as a "white supremacist who had been affiliated with the Aryan Nation."[497]

In spite of the fact that the marshals were rescued in the early morning hours of August 22, first-hand information about the incident which began the crisis was not gathered immediately because the marshals were not made available until 2:00 p.m.

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b6 b7C [ ] a cold front was approaching, with rain, snow, and temperatures in and around the twenties, and that the terrain around the crisis site was severe. There was no current intelligence as to the tactical preparations b6 b7C the Weavers might be making to engage law enforcement, but [ ] agents would have to take positions close to Weaver's residence to address the situation properly.

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By early morning, August 22, HRT Commander Rogers and the HRT advance unit had arrived, along with senior Marshals Service personnel. Rogers reported to Glenn:

> I asked Mr. Glenn for a quick briefing as to what the current situation was up on the mountain. He told me that they had managed to get Marshal Degan's body off and extricate the remaining marshals. Other than that, it was basically unknown what was taking place up around the cabin, because there were no law enforcement directly with eyes on at the shooting site or at the Weaver cabin.[501]

Glenn told Rogers that shots had been fired "early on," but Rogers did not think they "had a time frame when the last shot was fired."[502] Rogers did not do an independent investigation when he arrived because Glenn basically repeated what Smith had told him earlier.[503]

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[501] Rogers Trial Testimony, June 2, 1993, at 26.

[502] Id. at 190-91.

[503] Id. at 192.

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b3 6(2) b7C b6 [506] [ ]

b6 b7C [ ] Rogers did not talk to any of the marshals involved in the shooting because he had been told that they were asleep or were being treated for exposure. According to Rogers, the "implication" of this report "was that they were not available to me and that they would certainly have to be debriefed before I would have a chance to talk to them. . . debriefed I assumed by their own marshals."[507]

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[507] This failure to speak to the marshals was highlighted when Rogers testified that he did not know who David Hunt was nor did he know the identity of the source who had provided information about the previous day's events to Marshals Service Headquarters and Smith. Rogers Trial Testimony, June 2, 1993, at 189-90. Rogers also admitted during cross examination at trial that he had no information as to who killed Degan and that he had never spoken to Cooper or Roderick during his entire stay at Ruby Ridge.

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• Cooper and Roderick informed HRT members about the layout of the Weaver complex, the terrain, and weaponry. They told the HRT that there were no booby traps or mines on the Weaver property.

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3. Discussion

a. The Marshals' Report of the Shooting

There have been allegations that the marshals involved in the shooting and others in the Marshals Service intentionally concealed the marshals' role in the August 21 shooting. It has also been charged that the Marshals Service lied about Weaver's dangerousness and the circumstances at the time of the shooting to gain the FBI's support and assistance and to cover up a confrontation with the Weavers' son, Sammy.

At trial, the defense contended that a deputy marshal had fired the first shot, which killed the family dog Striker. After that shot a marshal knowingly and fatally shot Sammy Weaver in the back as he retreated from the firefight. The defense also contended that Sammy Weaver responded to the killing of his dog with gunfire, which Degan returned, and that Harris shot Degan in defense of himself and Sammy only after these events had occurred and because they were subjected to gunfire.

Those who believe that sequence of events, particularly after Weaver and Harris' acquittal for Degan's murder, have

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charged that the marshals involved in the shooting engaged in a coverup to protect themselves. That coverup is said to have included exaggerated accounts of aggressive acts at the shootout on August 21, Weaver's role in the events, and the danger of Weaver and Harris. One area repeatedly challenged at trial was the claim that the marshals were "pinned down" and had sustained "continuing fire" hours after the fatal shots had been fired.[518]

Defense counsel alleged in pretrial motions that, after the shooting at the Y, Hunt falsely reported to his superiors and to other law enforcement agencies that the marshals who remained with Degan's body were "pinned down in a fire fight."[519] We did not find any evidence that Hunt or any of the marshals claimed that they were receiving continual fire well after the exchange at the Y.

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[518] Briefly, our investigation found no intentional exaggeration of facts or a failure to disclose material facts. Moreover, we were unable to find any material representations made to FBI Headquarters which were unsupported by information in Marshals Service files. In our interviews, FBI Headquarters personnel and Marshals Service personnel did not report any significant incorrect information on the status of the marshals on the mountain, in contrast to media reports on the subject.

[519] Defendants' Memorandum, at 8-10.

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.[522] Hunt's reports to the Crisis Center are consistent with the accounts given by the marshals on the mountain. They believed they were "pinned down" in the sense that they were "outflanked" by the Weavers and might come under fire if they moved.[523] We conclude that the marshals did not deliberately attempt to mislead other law enforcement agencies about the events at the Y or the condition of the marshals still on the mountain.

b. Decision to Deploy the HRT

Our investigation found that the HRT was properly deployed to Idaho to address this crisis, a deployment, which, in accordance with FBI policy, had received specific approval from the Assistant Director of the Criminal Investigative Division at FBI Headquarters.

The training of HRT members and its ability to be deployed quickly made HRT a reasonable choice in this instance.

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[523] Roderick Trial Testimony, May 24, 1993, at 128, 266.

Furthermore, jurisdiction for the investigation of assaults on federal officers ("AFO") rests with the FBI. Although this began as a Bureau of Alcohol Tobacco and Firearms case and became a Marshals Service case, the Marshals Service does not have primary jurisdiction for investigating AFOs. In addition, Marshals Service supervisors were understandably concerned that action by the Marshals Service would appear to have been taken in retaliation.

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]This situation had been generated by a federal warrant based on a federal indictment involving federal law enforcement agencies. In attempting to effectuate a federal arrest, a federal officer had been killed, and the subjects of that shooting and the outstanding warrant remained at large. In light of these circumstances and the resources available to the federal response teams, we find reasonable and appropriate the decision to send FBI SWAT teams, the HRT, and the Marshals Service SOG to resolve this matter.

c. Initial Intelligence Gathering

In this section we discuss what the FBI did in the first 36 hours to verify the information it had obtained and to secure the best and most current information. Our investigation addressed criticism concerning the failure of Special Agent in Charge Glenn and HRT Commander Richard Rogers during their first hours at the site to update intelligence from more knowledgeable people present.

Almost within hours of setting up the command centers at Marshal Service Crisis Center and FBI Headquarters, both agencies had representatives at each other's command centers to aid communication.[524]

b5 b7C b6] we did not find intelligence gathering at the site to have been sufficiently thorough under the circumstances. [there were gaps in] information about the underlying events caused by failure to debrief the marshals involved in the shootout.

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b5 b7C b6 .] We found no evidence that anyone denied the FBI access to the marshals after they had been taken to the hospital and allowed to rest. [

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This inquiry also considered whether the Marshals Service tried to prepare the marshals for their interviews. [ ]

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We also find no evidence that the marshals were coached before their interviews.

this investigation has found no proof that the Marshals Service or the marshals themselves coordinated or altered their individual accounts of the events on the mountain.

Although the marshals had lengthy interviews on Saturday and Sunday with FBI agents and returned to the command post on Saturday and Sunday, none of them were interviewed by the FBI senior management team

It is not clear when the information developed in these interviews was shared

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It is difficult to estimate the impact additional intelligence gathering would have had on the decisions made during the crisis. Much of the information the FBI considered in

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assessing the danger and formulating Rules of Engagement and operational plans was consistent with what they would have heard from the marshals.

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]We found the background information on Weaver, which the Marshals Service gave the FBI and which served as a basis for the HRT deployment and the development of plans to secure the site, consistent with the information that was available in the Marshals Service files before August 21.

4. Conclusion

We found no evidence that the Marshals Service intentionally covered up or exaggerated Weaver's background or the events that had occurred at the Y in order to obtain assistance from other law enforcement personnel. However, we did find that the initial intelligence gathering by the FBI lacked thoroughness because of its failure early in the crisis to seek information from the Marshals Service personnel who had been on the mountain on August 21. Finally, this inquiry found that there was no abuse of discretion in the activation of the HRT in this situation. It was legally and factually justified and consistent with Department of Justice policy and procedures. No evidence was discovered during this inquiry that the decision to deploy HRT was based on improper or personal motives.

F. FBI'S Rules of Engagement and Operations on August 21 and August 22, 1992.

1. Introduction

The issues addressed in this part of our inquiry concern the initial response to the crisis by law enforcement agencies directed by the FBI and the decisions made to resolve the crisis.

During the early hours of the crisis, in addition to the movement of personnel and equipment, the primary concerns were to stabilize the situation and to gather intelligence. Throughout this early period, FBI officials were formulating a proposed plan of action -- also referred to as an "operation plan" or "operational plan" -- and specialized "Rules of Engagement" ("Rules").

It has been alleged that during this initial period negotiations were ignored as a strategy and that only tactical responses were considered. Indeed, the FBI has been criticized for its failure to contact the occupants of the Weaver residence until Saturday evening, after the sniper shots had been fired and Vicki Weaver had been killed.[

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[526] Some individuals have contended that the helicopter flights over the Weaver compound were designed to lure the subjects out so they could be targets for the snipers who were under orders to shoot to kill armed adult men.

Furthermore, it has been alleged that the FBI's operations plan and Rules of Engagement were developed to eliminate witnesses to the shootout on August 21 in retaliation for the death of Deputy Marshal Degan. Of particular concern are the Rules of Engagement, which instructed the FBI Hostage Rescue Team ("HRT") sniper/observers that they "can and should" use deadly force against any armed adult male, even before a surrender announcement had been made to the subjects or notice given that law enforcement was present. The Rules have been interpreted as unlawful "orders to shoot" by their severest critics and as being inappropriate for the situation or being inartfully drafted by others. It has been charged that the Rules used at Ruby Ridge were orders to shoot, which violated federal and state law and the FBI's own standard policy on the use of deadly force.

In this section we examine the factors considered in the formulation of the Rules and the reasonableness of some of these considerations, including the belief that the Weaver/Harris group

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was aware of law enforcement's presence and that every armed individual in the Weaver compound intended to cause bodily harm to law enforcement personnel. We also examine the intent of those who reviewed and approved the Rules and whether the Rules and the procedures used to develop and authorize their use conformed with FBI policy.

Finally, we evaluate those who operated under the Rules of Engagement and the actions they took while at Ruby Ridge. This portion of the report examines the circumstances surrounding the two rifle shots fired by HRT member Lon Horiuchi on August 22, 1992 and whether the ensuing death and injuries were the result of lawful acts.

2. Statement of Facts

a. The Formulation of Rules of Engagement En Route to Idaho on August 21, 1992

When FBI tactical teams, such as HRT or SWAT, are deployed and confrontations are a possibility, Rules of Engagement are commonly established. Rules of Engagement are described as instructions to deployed units or individuals that clearly indicate what action should be taken when confronted, threatened, or fired upon by someone. They are intended to provide a context within which decisions about the use of deadly force are to be made. They serve two purposes: to restrict the application of the standard FBI deadly force policy or to heighten the awareness of tactical personnel regarding the threat level of individual situations. Formulation and approval of the Rules of Engagement are the responsibility of the on-scene commander.[529]

The need for special Rules of Engagement for the Ruby Ridge crisis was discussed and agreed upon at an early point. While en route to Northern Idaho, Richard Rogers, Commander of the HRT, and Assistant Director Larry Potts had a series of conversations in which Potts advised Rogers of intelligence received.[530] The two discussed proposed Rules of Engagement with each other and with Deputy Assistant Director Danny Coulson.[

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Rogers explained his initial thoughts about the Rules of Engagement:

> In this particular situation, after hearing the description of what had taken place, specifically the fire-fight, the loss of a marshal, it was clear to me that there was a shooting situation taking place at this location. It appeared to me that it would have been irresponsible for me to send my agents into the situation without at least giving them a set of rules within the greater framework of the standard FBI rules, that would allow them to defend themselves. With that in mind, I proposed that the rules be that if any adult is seen with a weapon in the vicinity of where this fire-fight took place, of the Weaver cabin, that this individual could be the subject of deadly force. . . . [A]ny child is going to come under standard FBI rules, meaning that if an FBI agent is threatened with death or some other innocent is threatened with death by a child, then clearly that agent could use a weapon to shoot the child . . . that's the way its stated, but quite frankly, we try to prevent ourselves from being put in positions where children can threaten us and where we would have to use deadly force.[532]

When asked if he had considered the possibility that an adult might be seen with a weapon slung on his shoulder or carried in a nonoffensive way, Rogers replied:

> Yes, it was considered, and it's always my knowledge that my sniper observers and my other team members are clearly going to make a judgmental call as to whether to employ deadly force, and based upon the training, based upon the experience of these men, I know that they have absolutely the best judgment when it comes to use of deadly force.[533]

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] [532] Rogers Trial Testimony, June 2, 1993, at 20-21.

[533] Id. at 22-23.

Rogers acknowledged that the Rules of Engagement he proposed specified that any adult with a weapon observed in the vicinity of the Weaver cabin or in the firefight area "could and should be the subject of deadly force."[534] According to Rogers he discussed this rule with FBI Assistant Director Larry Potts who concurred fully.[535]

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Potts considered the information provided by the Marshals Service to be the basis of the proposed Rules of Engagement. He recalled the proposed Rules of Engagement as providing that:

> Any adult with a weapon who was observed in the vicinity of Randall Weaver's cabin or the fire fight area, could be the subject of deadly force. All efforts should be made to avoid any confrontation with children, but if such a confrontation became unavoidable, that faced with the threat of death or grievous bodily harm, the standard FBI use of deadly force policy would be in effect.[537]

According to Potts, he and Coulson believed that this crisis was the most dangerous situation into which the HRT had ever gone.

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[534] Rogers Trial Testimony, June 3, 1993, at 85-86.

[535] Id., June 2, 1993, at 24.

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No additional legal advice regarding the Rules was solicited from within the FBI.

Nor did the FBI officials drafting the Rules consult with the United States Attorney's Office having jurisdiction over the

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crisis. Assistant U.S. Attorney Ron Howen arrived at the crisis site shortly after the crisis began and remained there until the situation was resolved. While at the crisis scene, he provided legal advice and legal assistance regarding the preparation of legal documents, such as an affidavit supporting the government's request to obtain electronic surveillance of the cabin, and he forwarded information to the U.S. Attorney in Boise. Howen did not participate in any discussion about the operations plan or Rules of Engagement, and he was not involved in formulating or approving any of the operations plans or the Rules of Engagement. The local Boundary County prosecutor, who was also on site during the crisis, was also not consulted.

Coulson recalls that the proposed Rules of Engagement "were words to the effect of, 'any armed adult outside the Weaver cabin or on Ruby Ridge could be the subject of deadly force.'"[544]

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b. Formulation of the Rules Of Engagement and Operations Plan on August 22

When the remaining HRT members arrived, they went to the National Guard Armory in Bonner's Ferry, Idaho, where HRT

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Commander Rogers briefed them at 9:00 a.m.(PDT).[549] Rogers told the HRT members and SOG snipers that the Rules of Engagement had not yet been approved, and [ ] would brief the sniper/observers before their deployment. The proposed Rules of Engagement provided at the initial briefing were:

> Any adult with a weapon who was observed in the vicinity of Randall Weaver's cabin or the fire fight area, could and should be the subject of deadly force.

Following the briefing, the HRT travelled to Ruby Creek at the base of the mountain on which the Weaver cabin was located and began to establish tactical operations centers. This involved unloading and erecting command and bunk tents, clerical equipment and supplies, and weapons systems. Some HRT members began to assimilate the massive amount of information provided by the Marshals Service and local law enforcement agencies.[550]

While these organizational activities were in progress, HRT supervisors were engaged in the drafting of the Rules of Engagement and the establishment of an operational plan. McGavin prepared the original draft of the Rules. After reviewing this draft, Rogers told McGavin to scratch out what he had originally written and then proceeded to discuss with McGavin and [ ] what he wanted in the Rules. Rogers told McGavin to insert the "and should" clause into the Rules. [

[551]]

Rogers testified that the words that comprised the Rules were his words and that McGavin and [ ] wrote them down to provide the sniper/observers and other team members with Rules that "clearly reflect what I know I had approved through our chain of command."[552] These rules were:

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552 Rogers Trial Testimony, June 2, 1993, at 44.

> If any adult in the compound is observed with a weapon after the surrender announcement is made deadly force can and should be employed to neutralize this individual.
>
> If any adult male is observed with a weapon prior to the announcement deadly force can and should be employed if a shot can be taken without endangering the children.
>
> If compromised by any dog the dog can be taken out.
>
> Any subject other than R, V, + K, presenting threat of death or grievous bodily harm FBI rules of deadly force apply.[553]

Once at the site, Rogers proposed to Glenn that several things be done quickly. First, communication should be established with the people in the cabin or in bunkers, if there were any. Next, Rogers wanted to "call-out," to let the subjects know that the FBI was there and that there were warrants for their arrest. Finally, and most importantly, he wanted to ask them and give them the chance to surrender to law enforcement authorities, which, according to Rogers, is "standard procedure."[554] Since law enforcement personnel had not surrounded the cabin, Rogers also wanted to place sniper/observers around the site to cover law enforcement personnel and to cordon the site.[555]

Rogers testified that when the FBI makes an arrest, it tries to notify the subjects of the arrest that the FBI is present with a legitimate arrest warrant. This surrender announcement or "call-out" was going to be accomplished in this instance by agents going to the cabin area in armored personnel carriers and broadcasting the message with a megaphone or loud hailer. At the same time, the agents would drop off a phone at

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[553] Trial Exhibit No. 41-3, United States v. Weaver, CR 92-080-N-EJL. The Rule was modified from "adult" to "adult male" to exclude Vicki Weaver around 2:30 or 3:00 p.m. after consultation with Glenn because Vicki Weaver was not seen at the site of Degan's slaying. The change was communicated to the sniper/observers before deployment. Rogers Trial Testimony, June 2, 1993, at 31.

[554] Id. at 31-32.

[555] Id. at 50.

the site.[556] Rogers considered armored personnel carriers necessary protection for his agents. He saw no alternative to taking a phone to the cabin in the carrier because of the offensive posture the Weavers and Harris had taken.[557]

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By Saturday afternoon, a plan had evolved to place sniper/observers around the cabin. These sniper/observers would

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[556] Id. at 47-48.

[557] Id. at 48.

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be responsible for reporting movement at the cabin and providing protection if people left the cabin to shoot at the personnel carriers.[

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[561]]

When the HRT is activated, a proposed operation plan is written for resolving the situation. According to Rogers, when the HRT faces "a hostage situation or a barricaded subject situation, such as at Ruby Ridge," the plan includes "a proposed tactical resolution" that includes an "assault" or "a plan to send people inside the building to effect an arrest."[562]

Any deliberate assaults must be approved by FBI Headquarters. The plan for such an assault is contained in an operations plan.[

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]Glenn, with the understanding that the situation was "extremely dangerous and highly volatile," approved the following Rules of Engagement in the plan before sending the plan to FBI Headquarters for approval:

1. If any adult male is observed with a weapon prior to the announcement, deadly force can and should be employed, if the shot can be taken without endangering any children.

2. If any adult in the compound is observed with a weapon after the surrender announcement is made, and is not attempting to surrender, deadly force can and should be employed to neutralize the individual.

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[562] Rogers Trial Testimony, June 2 1993, at 99-100. See Trial Exhibit No. 41-4.

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3. If compromised by any animal, particularly the dogs, that animal should be eliminated.

4. Any subjects other than Randall Weaver, Vicki Weaver, Kevin Harris, presenting threats of death or grievous bodily harm, the FBI rules of deadly force are in effect. Deadly force can be utilized to prevent the death or grievous bodily injury to oneself or that of another.[564]

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b5/b7C b6 [ ] on August 22, an operations plan, which included the Rules of Engagement, was sent by facsimile to FBI Headquarters and the Marshals Service for review. The Rules in the operations plan as submitted to the Bureau for review stated:

> If any adult in the compound is observed with a weapon after the surrender announcement is made, deadly force can and should be employed to neutralize this individual. If any adult male is observed with a weapon prior to the announcement, deadly force can and should be employed, if the shot can be taken without endangering any children. [Emphasis added.][570]

FBI Deputy Assistant Director Coulson received the operations plan at the FBI Headquarters' Strategic Information and Operations Center; he did not approve the draft plan because it lacked a negotiations option. Coulson stopped reviewing the plan once he realized a negotiation option was absent. Thus, he never saw or reviewed the Rules of Engagement in the plan which appeared after the section in which a negotiations strategy should have appeared.[571]

After completing his partial review of the operations plan, Coulson made certain observations and raised certain questions in a facsimile to Glenn:

1. [No mention is made of Sniper Observer deployment as of 5:30 p.m. EST 2:30 PST (sic).]

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3. There is no mention of a negotiation strategy to secure release of individuals at the crisis point.

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4. These is no mention of any attempt to negotiate at all.

5. SAC Salt Lake is requested to consider negotiation strategy and advise FBIHQ

Coulson informed Glenn that Headquarters was "not prepared to approve the plan as submitted."

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When the operations plan was rejected, [ ] was asked to write a negotiation addendum. [

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This addendum was sent to FBI headquarters and received the following response:

> FBIHQ agrees with negotiation annex as submitted. Salt Lake should proceed with this negotiation plan on his [sic] own initiative.[578]

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The Rules of Engagement remained in effect until they were replaced by the FBI standard deadly force policy on August 26, 1992. Although Rogers testified that the operations plan was modified in the ensuing days and submitted to FBI Headquarters, he stated that it was never approved and never implemented.[582]

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c. Interpretation of Rules of Engagement by Law Enforcement Personnel

Both Assistant Director Larry Potts and former Deputy Assistant Director Danny O. Coulson have stated that the Rules of

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[579] The FBI conducted an internal administrative inquiry into the circumstances surrounding the two HRT rifle shots on August 22, 1992. For a discussion of the results of that inquiry see Section IV(G), infra.

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[582] Rogers Trial Testimony, June 2, 1993, at 102.

Engagement were merely a means of identifying the level of risk presented by the situation and were not intended to change or modify the FBI's Standard Deadly Force Policy.[583]

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HRT Commander Richard Rogers acknowledged that neither he nor any member of the HRT during his tenure had ever operated under Rules of Engagement such as those employed during the Ruby Ridge crisis.[597] He testified that under the standard FBI policy on the use of deadly force the FBI "ask[s] our agents for more -- we're asking that they wait a little longer to ensure that these individuals basically are going to employ some kind of deadly force against them."[598] At Ruby Ridge, he said, "we already know that the subject -- in this case, the males from the Weaver compound -- had already employed deadly force against the law enforcement officers, so they had clearly crossed that threshold in killing an officer already."[599] Rogers explained that the Ruby Ridge Rules told the HRT sniper/observers that they could wait a little less before employing deadly force. According to Rogers, the determination of how long to wait is left to the individual's discretion.[600]

By the phrase, "can and should," Rogers meant that the sniper/observers had the authority to utilize deadly force and should utilize it, if an opportunity presented itself. The Rules did not refer to the agents' judgment because judgment "is understood by every FBI agent, and clearly understood by every member of HRT. . . . [T]hey should use deadly force in order to protect themselves or other individuals."[601] He testified that he did not explain his understanding of the phrase "can and should" to the HRT snipers because:

> [T]hey understood what I was talking about . . . [and] I trained with them every day, and we discussed -- I mean, an FBI agent, from the time he goes through training at Quantico, has the standard rules of engagement drilled into his head. . . . I also have a sign with the standard FBI rules printed on it, hanging in the classroom at the hostage rescue team.[602]

HRT supervisor, Stephen McGavin, drafted the Rules of Engagement based on his understanding of the Rules as described by Rogers. [ ]

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[597] Id. at 69.

[598] Rogers Trial Testimony, June 3, 1993, at 66.

[599] Id. at 67.

[600] Id.

[601] Id. at 68.

[602] Id. at 68-69.

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Most significant is the testimony of Lon Horiuchi, the sniper/observer who eventually fired at members of the Weaver/Harris group. Horiuchi conceded that the Rules were different from those in the FBI manual and the Rules under which the HRT usually operated. He had never before been asked to operate under such Rules, which differed from the standard deadly force policy in that "the decision that we were already in danger had already been made for us prior to going on the hill."[619] Horiuchi testified that this was the first time he had been asked to apply Rules that differed from the standard deadly force policy. Under the latter, he could not shoot a person, unless that person posed a threat to his or another person's safety, and the decision as to whether a person posed a threat was left to Horiuchi. Under the new Rules, the decision that there was a threat had already been made.[620] Horiuchi acknowledged that,

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[619] Trial Testimony of Lon Horiuchi, June 3, 1993, at 164-65.

[620] Id. at 166-67.

under the Rules, he could and should shoot any adult male, if he had an opportunity.[621]

The following exchange during cross-examination summarizes Horiuchi's perception of the Rules:

> Q: Were you advised that the folks there had a habit of coming out of the house with the weapons?
>
> A: Yes sir, I believe that was one of the briefings.
>
> Q: So you knew that sometimes they came out, the dogs barked, they came out with their weapons, you knew that, didn't you?
>
> A: Yes, sir.
>
> Q: Under your rules of engagement, you could then and should, if they came out of the house, you could and should use deadly force?
>
> A: Yes sir, it is true.[622]

d. Deployment of FBI HRT, SWAT and U.S. Marshals Service SOG Personnel at Ruby Ridge.

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[621] Id. at 172-73. He emphasized that all the snipers were present when the Rules of Engagement were discussed:

> The individuals that went up on the hill were pre-briefed by me and Mr. Love, the other team leader, to ensure that the individuals that we had under our control were well-briefed on the rules of engagement.

Id. at 178.

[622] Id. at 193.

Before the Rules of Engagement were given to the teams, McGavin, second in command of the HRT, brought the typed Rules to Rogers at the command trailer. When Rogers returned later with word that they had been approved by FBI Headquarters, the HRT and U.S. Marshals Service SOG sniper/observers were briefed on the Rules of Engagement.[626]

[627] Marshals Service SOG personnel were deployed behind the HRT personnel to protect the

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HRT sniper/observers from hostile action from the rear.[628] [

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The sniper/observers were deployed to the mountainside overlooking the Weaver cabin to provide security for tactical units which, after the sniper/observers were in position, would form an inner perimeter around the Weaver compound. The sniper/observers were also deployed to be used to safeguard law enforcement officers attempting to establish communications with the cabin. Additionally, they were to be used to gather information about the terrain, armaments, and fortifications, along with information about those present at the crisis site.[630]

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The sniper/observers took several hours to work their way up the mountain to the observation posts. At 3:45 p.m.(PDT), during a reconnaissance flight, someone in the HRT helicopter warned the sniper/observers by radio of movement outside the Weaver cabin and in the compound area. The sniper/observer group halted until it was reported that the individuals had returned to the cabin. The group then continued up the hill.[633]

e. Use of the Helicopter

[b6 b7C b6] the purpose of the flights was to afford FBI, Marshals Service, and U.S. Attorney's Office personnel the opportunity to assess the area and the terrain around the Weaver residence.[

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[633] Horiuchi Trial Testimony, June 3, 1993, at 32. [

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f. Placement of HRT Sniper/Observers in Area Surrounding the Weaver Cabin

Because of the rugged terrain and deteriorating weather conditions, HRT sniper/observers began arriving at positions on the ridge overlooking the Weaver cabin approximately two to two and one half hours after setting out from the command post/staging area.[637]

At 5:07 p.m., the HRT sniper/observer team [ ] arrived at its position. This team consisted of Lon Horiuchi and [

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Horiuchi's [ ] position was the closest of the four positions, almost due north of the cabin in a line almost parallel to the front wall. He was at a slight angle above the cabin, approximately 646 feet from the front door and approximately 579 feet from the outbuilding known as the "birthing shed." There was a ravine between Horiuchi and the cabin.[639] Horiuchi could see the top of the front porch of the cabin and straight through the porch. He could see the front of the door as it opened and when it was in an open position. Horiuchi could not see the front door when it was closed, nor

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[639] Upon arrival at his position, Horiuchi took out his rain jacket because it had begun to rain. He positioned his rifle through the limbs of a small pine tree. His weapon was a Remington, Model 700 rifle which has a fixed Unertyl, ten power telescopic sight. The weapon fires a .308 caliber, match grade 168 grain bullet.

could he see into the cabin. He could also see the deck at the back of the cabin.[640]

g. Circumstances Involving the Two Rifle Shots Taken by HRT Member Lon Horiuchi.

(1) The First Shot

At approximately 5:45 p.m., Horiuchi saw an unarmed, young female, slight of build, with a ponytail, run from the front of the Weaver cabin toward a rocky outcropping.[b3 6(e) b7C b6

[641]] Horiuchi is unclear about the length of time the female was outside the cabin.[642]

After viewing this female with the naked eye, Horiuchi observed her through his rifle scope and determined that she was a child. Although he could have fired at her, he did not because "the female was not armed at that time and [he] was assuming she was a child because of the size of the stature."[643] Horiuchi could not recall whether the front door was open when the child was outside the cabin, but after she returned to the cabin, the door was closed.[644]

Within a minute after the girl returned to the cabin, Horiuchi observed an unarmed male on the back deck. The man moved to the back corner of the deck where ponchos or blankets were hanging on a string. "It seemed like he just felt them to see if they were dry and then he went back in."[645] The man was in Horiuchi's vision for perhaps ten seconds, and, although Horiuchi could have both fired and hit the person, he did not

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b3 6(e) b7C b6 [640] Horiuchi Trial Testimony, June 3, 1993, at 52-57.

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b5/b7C b6] At trial, he said that the female stayed outside the cabin "two or three minutes, I'm not sure." Horiuchi Trial Testimony, June 3, 1993, at 63-64.

[643] Id. at 64.

[644] Id. at 64-65.

[645] Id. at 66.

because "the individual did not appear to be armed, there was nothing in his hand, and I did not see any weapons around or on his person."[646]

At 5:57 p.m., the HRT helicopter took off [ ].[648] HRT Commander Rogers, Marshals Service Deputy Director Smith, Marshals Service SOG Commander Haynes, and HRT pilot Frank Costanza were aboard.[649]

Rogers and Smith recall that someone aboard the helicopter [ ][650] reported seeing two persons outside the cabin, armed with rifles,[651]

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Horiuchi heard the helicopter and the armored personnel carriers start their engines, and he saw the helicopter take off from the command post to the left of the Weaver cabin, circle to his left and out of his sight.[653] Within five to ten seconds after the helicopter engine started, Horiuchi saw two males and the female he had seen earlier come out of the front door of the cabin and run toward the "rocky outcropping," a defensive

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[646] Id. at 66-67.

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[649] Rogers Trial Testimony, June 2, 1993, at 60-61.

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[651] Rogers Trial Testimony, June 2, 1993, at 63-65.

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[653] Horiuchi Trial Testimony, June 3, 1993, at 67-69.

position near the front of the cabin.[654] [

b3 6(e) b7C b6 however, Horiuchi saw [ ].[655] At a point. [ ] a male [ ][656] was carrying a long gun, in a "high port carry, both hands on the weapon and across his body . . . ."[657]

Horiuchi saw the three people run behind the "birthing shed," a wooden building close to the cabin and disappear from his view. Horiuchi focused on the person he believed to be Harris because he was carrying a "shoulder weapon" at "port arms."[658] Horiuchi did not shoot [

b3 6(e) b7C b6 [659]] because the person was not making any threatening movement.[660]]

Horiuchi continued to focus on the armed male as he rounded the rear corner of the birthing shed and again came into Horiuchi's field of view. [

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[654] Id. at 81. Horiuchi assumed that the female was the same person he had seen earlier because of her small stature. Id. at 74.

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[657] Horiuchi Trial Testimony, June 3, 1993, at 70-72.

[658] "Port arms" is a military term which describes a weapon being carried across the chest with both hands in a slanting direction with the barrel near the left shoulder.

b3 6(e) b7C b6 [659] [ ]

[660] Horiuchi Trial Testimony, June 3, 1993, at 86-87.

b3 6(e) b7C b6 [661] [ ]

Horiuchi continued to concentrate on the person who had rounded the rear corner of the birthing shed. As he came back into view, Horiuchi believed that the man was the armed individual he had initially seen running from the cabin.[665] The man picked up a stick and appeared to be poking at the ground and looking up above and to the right of Horiuchi where Horiuchi sensed that the helicopter was flying.[666]

[667]

When the person reappeared at the side of the shed from which he had disappeared, he held his weapon at high port and scanned above and behind Horiuchi's position. He seemed to be

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[665] Horiuchi Trial Testimony, June 3, 1993, at 81-82.

[666] Id. at 82.

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looking for the helicopter. The person was "watching the helicopter, and at times he would kind of bring his weapon up and [Horiuchi] perceiv[ed] that perhaps he was trying to get a shot off."[668]

Holding his weapon high, the person moved along the side of the birthing shed. He turned his back to Horiuchi. It appeared to Horiuchi that the person had seen the helicopter and was attempting to get back to the other side of the birthing shed. Horiuchi believed that the person was getting ready to shoot at the helicopter with his rifle, which had a scope.[669] Horiuchi fired one shot, just as the man suddenly moved along the side of the birthing shed out of sight.

When Horiuchi shot, the man was at the corner of the shed, with his back toward Horiuchi. Horiuchi's "sight picture" showed the man as jumping or moving to a lower position, behind the birthing shed.[[670]] Horiuchi "assumed that he was raising [his arm] to grab inside the building to spin himself around the corner."[671] Horiuchi acknowledged that when he shot he was aiming at the man's back.[672]

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Horiuchi assumed that he had hit the man or the edge of the birthing shed.[673] After he fired, the person "continued to move around the corner of the birthing shed, so -- without any effect, it didn't seem like he was hit at all, so that's why my assumption was that I had missed."[674]

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[668] Horiuchi Trial Testimony, June 3, 1993, at 88, 90.

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[669] Id. at 93; [ ] Horiuchi conceded that, although it may not have been effective, he could have yelled to Weaver and Harris to drop their weapons before he fired his first shot. Horiuchi Trial Testimony, June 3, 1993, at 169.

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[671] Horiuchi Trial Testimony, June 4, 1993, at 40-41.

[672] Id. at 42.

[673] Id., June 3, 1993, at 93.

[674] Id. at 94. However, Horiuchi acknowledged that he knew that the man had been hit "in the back up towards the fleshy part of his arm." Id. at 37.

Horiuchi assumed that the person at whom he had fired was Kevin Harris.[675] In fact, Horiuchi shot Randy Weaver. After the first shot, Horiuchi decided that he would shoot at this person again, if he got the opportunity.[676]

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(2) The Second Shot

According to Horiuchi, after ten to twenty seconds, the man he thought he had initially shot at came back into his view, joined by the other male and the female. Horiuchi observed the male and female run toward the cabin trailed by nine steps by the man Horiuchi thought had been the target of his first shot.

The first two people disappeared behind the open door and, Horiuchi assumed, went inside the cabin. Horiuchi had determined after the first shot that he "was going to shoot at that individual again" because:

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[675] Id. at 103.

[676] Id., June 3, 1993, at 90-94.

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> I believed he was the same individual that had attempted to shoot . . . at the helicopter, and therefore, I assumed that he was moving back to the house to get a more protected location inside the house and I didn't want him back in the house. . . . [K]nowing that the children were inside the house, that would have been my last opportunity to shoot him before he got into the house because I probably would not have shot at anyone inside the house for fear of shooting the children. . . . [H]e would have been more protected inside the house and he could have shot at either me or my fellow agents or the helicopter still flying around at that location, probably knowing that we couldn't shoot back in there without harming some of the children.[679]

Horiuchi fired as Harris approached the porch. Harris was reaching out with his left hand toward the door and taking a last step to the doorway, appearing to be holding the door open or moving someone out of the way.[

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Horiuchi was leading the running target, that is, aiming slightly in front of him as he ran, so that the target subject would, in effect, run into the bullet. The cross hairs of the rifle's scope were on the edge of the door or just on the wood portion of the door.[681] The door was fully open, and Horiuchi could see the entire front face of the door, except for the bottom portion. At the time of the shot, the target had his weapon in his right hand and was reaching out with his left hand.[682]

Horiuchi saw the individual flinch as if he had been hit and disappear into the doorway. The man reacted like he had been "punched" or hit on the side; he fell behind the door.[683]

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[679] Horiuchi Trial Testimony, June 3, 1993, at 110-11.

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[681] Horiuchi Trial Testimony, June 3, 1993, at 113 and June 4, 1993, at 12-14.

[682] Id., June 3, 1993, at 111-15. Horiuchi testified that he could not see through the window in the door.

[683] Id. at 126.

Afterwards, Horiuchi heard a female scream for about 30 seconds.[684] He assumed that the female was screaming because Harris had been hit.[685] In fact, Vicki Weaver had been fatally shot.

Horiuchi assumed that the individuals preceding the person at whom he shot had gone inside the cabin. He has testified that he did not see anyone standing behind the door when he shot and that he did not intend to shoot Vicki Weaver.[686]

In connection with the 1992 internal FBI shooting incident review, Horiuchi prepared a rough sketch describing the positions of the two people -- Randy and Sara Weaver -- who entered the cabin just before the second shot. The sketch was intended to approximate their positions in relation to the cabin door based on their speed and movement. Horiuchi testified that he could not see them when he fired. Both the sketch and Horiuchi's testimony reflect he believed that Randy and Sara Weaver would have been crouched down behind the door with their heads approximately at the level of Harris' chest at the time of the shot.[687]

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[684] Id.

[685] Id. at 127.

[686] Horiuchi Trial Testimony, June 4, 1993, at 62. Horiuchi also testified that at the time Harris was reentering the cabin Horiuchi "knew that [Harris] was trying to move somebody out of the way when [he] shot, and that [Horiuchi] knew somebody was behind [the] door." Horiuchi emphasized that, "[he] wasn't shooting at the individual behind the door, [he] was shooting at Mr. Harris." Id. at 61-62.

[687] Horiuchi Trial Testimony, June 9, 1993, at 21-22. For a discussion of the discovery issues surrounding the Horiuchi Shooting Incident Review sketch, see Section IV(M)(2), infra.

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Pages 197-198 of Report
have been withheld
in their entirety
pursuant to
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

h. Initial Surrender Announcement

Following the shots, the helicopter landed at the command post. HRT Commander Rogers ran to the Tactical Operations Center and received confirmation that Horiuchi had fired.[693]

Rogers and FBI Special Agent In Charge Eugene Glenn agreed to deploy the armored personnel carriers to establish communications with the Weaver cabin.[694] The hostage telephone, telephone wire, and other necessary equipment were on the

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[693] Rogers Trial Testimony, June 2, 1993 at 66-67.

[694] Id. at 67.

carriers. At approximately 6:15 p.m., the two carriers were driven to the cabin area[

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b6 Once they arrived at the cabin area,[
b7C]gave the prearranged surrender announcement. He told the cabin's occupants about the arrest warrants for Weaver and Harris and asked Weaver to accept the telephone so that negotiations for his surrender could proceed.[696]

b5 b7C [ ]There was no response from the cabin.
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3. Discussion

a. FBI Rules of Engagement

(1) Factors Considered in the Formulation of the Rules of Engagement

In our view, the information available to FBI supervisors justified their apprehension and their anticipation of extreme danger during the initial stages of the FBI response to the crisis at Ruby Ridge.[

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HRT Commander Rogers testified that the HRT did not know for certain that the Weaver/Harris group was inside the cabin when the snipers were deployed. Nor did he know whether Weaver knew of the presence of law enforcement or of the withdrawal of the

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marshals.[698] In crafting the Rules of Engagement, Rogers had to consider the possibility that the subjects were in firing position and that they were scattered around the area.

Rogers believed that the fact that the marshals had been rescued and that Degan's body had been taken off the mountain did not alter the potential danger. He found no evidence that the mind-set of the people who had killed Degan had changed. They had not surrendered or attempted any explanation for the death, and Rogers had no reason to believe that Degan's death had been accidental. As far as he knew, the Weaver/Harris group was prepared to kill other law enforcement officers.[699]

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Vicki Weaver's diary reflect their knowledge that the gunfight at the "Y" was with law enforcement.[701]

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(2) Approval of the Rules of Engagement

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[698] Rogers Trial Testimony, June 3, 1993, at 64.

[699] Rogers Trial Testimony, June 2, 1993, at 30.

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[701] For example, Vicki Weaver described the dog chasing "servants of the New World Order" down Farnsworth Road. Diary Entry, August 21, 1992.

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The Rules of Engagement were initially formulated while Commander Rogers was en route to Idaho. Rogers testified that FBI Assistant Director Larry Potts approved the Rules of Engagement during that flight before Rogers landed in Idaho. The three people, who discussed the Rules of Engagement that evening, recall the proposed Rules differently.

Potts recalled approving the following Rules:

> 1. [A]ny adult with a weapon who was observed in the vicinity of Randy Weaver's cabin or the firefight area, could be the subject of deadly force.
>
> 2. [A]ll efforts be made to avoid any confrontation with the children, but if such a confrontation became unavoidable, that faced with the threat of death or grievous bodily harm, the standard FBI use of Deadly Force Policy would be in effect.

b5 Potts claimed that he had approved these Rules of Engagement, that they were consistent with the FBI's deadly force policy[ ][ ][702]

b5/b7C/b6 [ ]Potts was made aware that before the deployment Glenn and Rogers modified the Rules of Engagement by changing the words "any adult" to "any adult male."[ ][ ][703]

b6/b7C Potts [ ]did not realize the Rules had been changed from deadly force "could" be employed to deadly force "can and should" be employed until after the crisis was resolved. However, he believes that "should" does not mean "must" and that it only serves to heighten the awareness of the threatening situation at hand.[704]

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Danny Coulson, Deputy Assistant Director of the FBI at the time, also recalled the Rules as formulated as using the term "could" as opposed to "can and should." He too was unaware that the proposed operations plan contained Rules of Engagement that used the term "deadly force can and should be employed".[705]

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A lack of documentation in the FBI files made our review of the approval of the Rules of Engagement very difficult.[

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] There are no notes or records of Potts' and Coulson's initial approval of the Rules. Moreover,

.] We find this lack of documentation significant and serious.[

.] The failure to record and preserve significant events, meetings, and discussions should be corrected.

On Saturday, August 22, written Rules of Engagement were approved by Glenn, and sent by facsimile to FBI Headquarters as part of an operations plan sometime between 2:30 and 3:00 p.m. (PDT). Glenn approved the written Rules in the morning in their original form and again in the afternoon, as modified to cover only armed adult males as subjects of deadly force before a surrender announcement. That plan was not approved. A negotiations strategy was requested.[

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] Coulson reviewed the plan up to the point where a negotiation strategy should have been detailed. Finding none, he decided not to approve the plan and notified Potts of his decision.[706]

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Before briefing the sniper/observers on the Rules of Engagement, Rogers asked Glenn if FBI Headquarters had approved

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[706] Having spent the previous evening at Headquarters, Potts was at home when the operations plan arrived.

It is our conclusion that Rogers justifiably believed that the Rules of Engagement provided to the HRT and SOG personnel were fully authorized. On the trip to Idaho, Rogers had received oral authorization for the use of special Rules from Potts and Coulson.[709] Finally, before the snipers were briefed on the Rules and deployed, Rogers secured Glenn's acknowledgement that FBI Headquarters had approved the final version of the Rules.

Although we found no written record reflecting approval of the Rules of Engagement, Potts acknowledged that he approved a version of the Rules early in the crisis without the word "should" and with the understanding that Glenn had authority to limit the Rules to "adult males" without Potts' approval.

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(3) The FBI Standard Policy on the Use of Deadly Force and the Constitutionality of the Rules of Engagement

The FBI's Standard Deadly Force Policy states that:

> Agents are not to use deadly force against any person except as necessary in self-defense or the defense of another, when they have reason to believe they or another are in danger of death or grievous bodily harm. Whenever feasible, verbal warnings should be given before deadly force is applied.[711]

The purpose of the policy is to inform agents of circumstances when the use of deadly force in the line of duty is appropriate and to prohibit the use of deadly force in other circumstances. According to the FBI's training materials, the policy's importance is its uniformity of instruction, utilization, and administrative review. Such uniformity eliminates uncertainty and confusion.[712]

"Deadly force" is defined in the policy as force likely to cause death or serious bodily injury. Under FBI policy, deadly force is justified, if the subject is likely to cause death or

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[711] FBI Deadly Force Policy, November 1992, at 1.

[712] Training Materials on the FBI Deadly Force Policy, November 1992, at 1.

serious bodily injury if not controlled and deadly force is necessary to achieve control safely. When deadly force is permissible, agents are instructed to utilize the amount of force reasonably necessary to eliminate the threat they face. When feasible, verbal warnings should be given before deadly force is applied, and, when a subject may be granted an opportunity to surrender without exposing agents or the public to unreasonable danger, the policy requires that the opportunity be given.[713]

The FBI's standard deadly force policy comports with the constitutional standards enunciated by the U.S. Supreme Court in Tennessee v. Garner, 471 U.S. 1 (1985), and Graham v. Connor, 490 U.S. 386 (1989). Garner requires that the officer have probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, before using deadly force to prevent escape. The standards for objective reasonableness set forth in Graham are considerably more explicit than those in Garner and also require consideration of whether the suspect poses an immediate threat to the safety of the officers or others.[714] The preconditions in the FBI's deadly force policy for the use of deadly force are essentially the same as those stated in Garner, that is, that deadly force may be used to protect oneself or others against death or grievous bodily harm. The FBI's deadly force policy also includes a provision for giving warnings, when feasible, as mandated by Garner.

We are considerably less sure about the constitutionality of the Rules of Engagement in effect on August 22, 1992 than we are about the FBI's standard deadly force policy. The Rules provided:

1. If any adult in the area around the cabin is observed with a weapon after the surrender announcement had been made, deadly force could and should be used to neutralize the individual.

2. If any adult male is observed with a weapon prior to the announcement deadly force can and should be employed if the shot could be taken without endangering any children.

3. If compromised by any dog the dog can be taken out.

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[713] Id. at 2-3.

[714] The provision for warnings found in Garner, which is also part of the FBI Standard Deadly Force Policy, is absent in Graham.

4. Any subjects other than Randy Weaver, Vicki Weaver, Kevin Harris presenting threat of death or grievous bodily harm FBI rules of deadly force apply.

We believe that these Rules contain serious constitutional infirmities.[

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these Rules of Engagement created an atmosphere in which the sniper/observers were more likely to employ deadly force than had the FBI standard deadly force policy been in effect.

In addition to the aforementioned problems, we must conclude that the Rules of Engagement were defective for three other reasons. First, they were imprecise.

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Our second objection to the Rules relates to the impact the Rules had upon the HRT during its deployment on August 22. The Rules seem to have created an atmosphere a "more offensive mode."[715]

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Our final objection to the Rules is that they were an unconstitutional departure from the FBI's standard deadly force policy.

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we must conclude that the Rules in effect were unconstitutional.

b. Initial Deployment of Law Enforcement Personnel to Ruby Ridge.

The FBI viewed the situation at Ruby Ridge as extremely dangerous. Potts, the Assistant Director of the Criminal Investigative Division of the FBI, feared that casualties would be sustained in the attempt to establish a perimeter at the crisis site. He characterized the situation at Ruby Ridge as "the most dangerous situation the HRT has ever gone into."[717] Similarly, Coulson, the Deputy Assistant Director of the Criminal Investigative Division of the FBI at the time, assessed the situation as posing an extreme risk to law enforcement personnel.

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we have concluded that Horiuchi's decision not to shoot the two armed males on sight is probably a testament to his training, given the Rules on which he had been briefed at least three times that day.

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The first priority of the FBI at Ruby Ridge was to secure and control a perimeter around the Weaver cabin to ensure the safety of law enforcement personnel and to prevent the escape of those who may have been involved in the exchange of gunfire the previous day. In addition, the FBI wanted to obtain information about the situation based upon firsthand observation rather than having to continue to rely upon the reports from other law enforcement agencies.

We agree that the deployment of tactical personnel at Ruby Ridge to establish a perimeter around the Weaver cabin was a sound decision.

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the initial strategic step by the FBI to deploy HRT sniper/observers and members of the Marshals Service SOG around the cabin was appropriate.

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c. The HRT Rifle Shots Fired on August 22, 1992

(1) The Applicable Standard for Review

The Fourth Amendment provides persons with the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and this right extends to those persons suspected of actual or anticipated criminal wrongdoing. When police officers arrest a criminal suspect, they make a seizure, thereby bringing their conduct within the protection of the Fourth Amendment. The Fourth Amendment and the case law emanating from it provide that, while there are important governmental interests in effective law enforcement,

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Horiuchi acknowledged at trial that he could have stood up and told Weaver and Harris to drop their weapons. However, he also testified that "yelling may not have been effective" and that he "didn't have the time or the distance or probably the voice loud enough to yell at either Weaver or Harris to drop the weapon." Horiuchi Trial Testimony, June 3, 1993, at 169.

there are equally powerful countervailing interests supporting a person's right to be free from the intrusiveness which inevitably accompanies a seizure.

The U.S. Supreme Court has considered the question of seizures by the use of deadly force and has articulated a framework with which to analyze their constitutionality. In Tennessee v. Garner, 471 U.S. 1, 7 (1985), the Court stated that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." When a police officer kills or mortally wounds a suspect while attempting to make an arrest, the ultimate seizure occurs. Not only is the suspect deprived of his life, in which he has the most fundamental interest, but society is deprived of the "judicial determination of guilt and punishment." Id. at 9. However, the Supreme Court recognized that effective law enforcement requires that deadly force be permissible in some circumstances.

In Garner, a burglary suspect fled the crime scene while a police officer pursued him. Although the officer identified himself and ordered Garner to stop, Garner continued to scale a fence. The officer, who saw no weapon and who was reasonably sure that Garner was unarmed, fired shots that killed Garner. The state statute permitted an arrest by all necessary means if the suspect had been provided notice of the officer's intent to arrest him yet persisted in fleeing or forcibly resisting arrest. The Supreme Court ruled this statute unconstitutional because it justified the use of unreasonable force, regardless of the danger that the suspect presented.

The Court in Garner enunciated a general theory permitting the use of deadly force by police officers:

> [W]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

Id. at 11-12.

It was not until 1989 in Graham v. Connor, 490 U.S. 386, that the Supreme Court articulated an objective standard for evaluating the use of deadly force. In Graham, police had forcibly detained Graham, a diabetic, and prevented him from

drinking orange juice to prevent the onset of insulin shock. The police handcuffed Graham and ignored or rebuffed his attempts to explain and treat his condition. Graham sustained multiple injuries and was released when it was determined that he had done nothing wrong.

The Supreme Court rejected the subjective standard the district and appellate courts had imposed which had required Graham to show that the police had applied force "maliciously and sadistically for the very purpose of causing harm." Id. at 390-391 (citations omitted). The Court held that instead of a subjective standard "all claims that law enforcement officers have used excessive force -- deadly or not -- . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard. . . ." Id. at 395.

The Court proceeded to hold that "determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." Id. at 396 (citations omitted). Among the factors to be considered are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. No "bright line test" was articulated "because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.'" Id. (citations omitted). Courts must consider the officers' conduct in light of the totality of the circumstances. Id.

The Graham court emphasized that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. (citations omitted). Thus, police officers are accorded some deference because they are "often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." Id. at 397.

This test of "objective reasonableness" must be applied to both shots taken by Horiuchi. Because almost all excessive force cases are "fact intensive," Fraire v. City of Arlington, 957 F.2d 1268, 1269 (5th Cir. 1992), and this case is no exception, we must examine carefully the facts surrounding the shots to determine whether they met the constitutional test of objective reasonableness.

(2) The First Shot

With respect to the objective reasonableness of each of Horiuchi's shots, we must examine them in conjunction with the factors enunciated by the Graham court -- the severity of the crime, whether the suspect posed an immediate threat to the safety of the officers or others, and whether he actively resisted arrest.

Before assuming their positions overlooking the Weaver compound, Horiuchi and the other agents had been briefed about the encounter at the Y. From this briefing, they knew that a marshal had been killed; that Weaver had sophisticated weapons experience; that the family had declared that they would never surrender to the federal government and were prepared for a confrontation with the government; that the family was generally armed when they left the cabin; and that the family made armed responses to approaching people and vehicles.[

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]they knew: that more than one shot had been fired at the "Y"; that Randy Weaver, Kevin Harris, and Sammy Weaver had been there; and that Kevin Harris had shot and killed Deputy Marshal Degan. In addition, they had been informed that, following the shooting, shots had been fired at an airplane and that there had been unconfirmed reports of an April 1992 shooting at a news helicopter near the Weaver compound.

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.]Horiuchi knew that a severe crime had been committed, and he knew that Weaver was resisting arrest with Harris' assistance.[720]

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]Before Horiuchi fired his first shot, he had two opportunities to shoot, first at the young girl, and then at an unarmed man who was prodding the ground with a stick. Horiuchi did not shoot either person because he believed the young female was an unarmed child and that the man was not behaving in a threatening manner.

According to Horiuchi, he fired the first shot only after he heard and saw the helicopter. When the person whom he believed

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]After engaging in the firefight that killed Degan, Harris retreated with Weaver to the cabin and emerged only when armed. There was no indication that Harris or any member of the Weaver/Harris group was going to surrender to law enforcement.

to be Harris reappeared at the side of the shed from which he had disappeared, he held his weapon at high port and scanned above and behind Horiuchi's position. Horiuchi believed that the man was looking for the helicopter. According to Horiuchi, the person was "watching the helicopter, and at times he would kind of bring his weapon up and [Horiuchi] perceiv[ed] that perhaps he was trying to get a shot off."[721]

The person in Horiuchi's sights moved along the side of the birthing shed, while holding his weapon high. Horiuchi believed that the person had seen the helicopter and was attempting to get to the other side of the birthing shed. Horiuchi concluded that the person was preparing to shoot at the helicopter with his scoped rifle.[722] He saw the individual watching the area where Horiuchi believed the helicopter was flying and saw the man "getting ready to take a shot at the individuals in the helicopter."[723] Horiuchi's "sight picture" on his rifle showed the man jumping or moving to a lower position, behind the birthing shed. [724] Horiuchi "assumed that [the man] was raising [his arm] to grab inside the building to spin himself around the corner."[725] It was at this time that Horiuchi fired one shot. At the time Horiuchi shot, the man was at the corner of the shed, with his back toward Horiuchi. According to Horiuchi, he was aiming at the man's back at the time he fired the shot.[726] After the shot was fired, the man suddenly moved along the side of the birthing shed and disappeared from Horiuchi's vision.

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[721] Horiuchi Trial Testimony, June 3, 1993, at 88, 90.

[722] Id. at 93;

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[725] Horiuchi Trial Testimony, June 4, 1993, at 40-41.

[726] Id. at 42.

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b5/b7C b6 At trial, Horiuchi was adamant that he never saw a gun in the hands of Randy Weaver, even though Weaver was armed at the time he was struck by Horiuchi's first shot.[729]

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we find reliable and reasonable his perceptions that: the target was an armed man; the helicopter was in flight; and that the movements of the man indicated a threat to the helicopter.

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[729] Horiuchi Trial Testimony, June 4, 1993, at 34-35.

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Weaver and Harris have stated that their actions were innocent and not indicative of aggressive conduct. According to them, they left the cabin to view Sammy Weaver's body in the birthing shed[

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]we believe that Horiuchi reasonably interpreted the actions of the three people as they ran from the cabin as aggressive.

The law requires that we give some deference to Horiuchi's perceptions of the threat to the helicopter and the individuals aboard it. Indeed, the Supreme Court in Graham cautions that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham, 386 U.S. at 396. In Graham the Supreme Court also advised that, in assessing the reasonableness of the use of deadly force, one must allow for the fact that police officers are often forced to make split-

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second judgments in circumstances, like those at Ruby Ridge, that are tense, uncertain, and rapidly evolving. As the Sixth Circuit emphasized in Smith v. Freland:

> [W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

954 F.2d at 347.

Applying these standards to the first shot taken by Horiuchi, we conclude that the shot meets the constitutional standard of "objective reasonableness."[

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(3) The Second Shot

We now look at the immediacy of the threat factor to evaluate whether the second shot which Horiuchi took was justified. The second shot, after passing through the window of the cabin door, killed Vicki Weaver who was standing behind the door and also seriously injured Kevin Harris.

As a preliminary matter, the two conditions we found satisfied in regard to the first shot -- the reasonable conclusion that the suspects had been involved in a severe crime and that they were actively resisting arrest -- were satisfied at the time of the second shot. Again, our focus must be on whether the target of Horiuchi's shot posed an immediate threat to the officers or others.

In our discussion above, we found that when Horiuchi fired the first shot, he made a judgment of threat and necessity based on his observation that the armed male posed an immediate threat of death or serious harm to the occupants of the helicopter.

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b5/b7C b6 [.[735] Horiuchi feared that once the man returned to the cabin, he would have been more protected and could have shot at HRT personnel or the helicopter. Horiuchi felt that the man probably knew that law enforcement "couldn't shoot back in there without harming some of the children."[736]

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[736] Horiuchi Trial Testimony, June 3, 1993, at 111.[

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]Horiuchi testified at trial, "I had already made that determination after that first shot, so if I saw him again I was going to shoot at that individual again."[738]

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] At trial, Horiuchi characterized Harris' action as a "pause." Horiuchi Trial Testimony, June 4, 1993, at 86.

738 Horiuchi Trial Testimony, June 3, 1993, at 111.

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At Ruby Ridge, FBI supervisors in charge of the crisis determined that, following the deployment of HRT sniper/observers around the cabin, a negotiation strategy was to be employed,[740]

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At trial he testified that it appeared that Harris "was trying to hold the door open or moving somebody out of the way" when Horiuchi fired.[741] When asked if he "knew there was somebody behind the door," Horiuchi responded that he "wasn't shooting at the individual behind the door."[742]

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b6 b7C [740]

b6 b7C [741]

[742] Horiuchi Trial Testimony, June 4, 1993, at 61-62.

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we do not believe that the evidence indicates that Horiuchi actually saw Vicki Weaver or anyone else behind the door. The bullet holes in the curtain and the entry hole in the door's window are consistent with Horiuchi's testimony that the curtain obstructed his view.[744] We also find no evidence that Vicki Weaver was the intended target of the second shot as has been alleged. Horiuchi testified that he did not intend to shoot her.[745] Our review of the evidence has produced nothing to discredit those statements.

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[743] [b5/b7C b6

] Horiuchi testified that, once the subjects were in the cabin, they would be able to fire out and be protected from return fire because the HRT "probably would not have shot at anyone inside the house for fear of shooting the children." Horiuchi Trial Testimony, June 3, 1993, at 110-11.

[744] Horiuchi acknowledged that, had the curtain on the door been open, he could have seen Vicki Weaver. Horiuchi Trial Testimony, June 9, 1993, at 20-21.

[745] Id. at 140.

[746] [b5/b7C b6e

(continued...)]

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"if the suspect threatens [an] officer with a weapon" or "there is probable cause to believe that [the suspect] has committed a crime involving the infliction of serious physical harm."[751]

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]Garner, 471 U.S. at 11). (Emphasis in original.)

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"deadly force may be used to prevent escape", if "the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction . . . of serious physical harm."[753]

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"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[754]

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deadly force "may not be used unless it is necessary to prevent [an] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical harm."[755] Finally, the immediate threat requirement is reiterated by the Supreme Court in its conclusion that the "proper application" of the Fourth Amendment to the use of deadly force requires "careful attention" to a number of factors, which include not only "the severity of the crime at issue," but also "whether the subject poses an immediate threat."[756]

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we have concluded that the retreating subjects did not pose an imminent threat of physical harm.

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[752] [redacted]

[753] Garner, 471 U.S. at 11.

[754] Id. (Emphasis added.)

[755] Id. at 3. (Emphasis added.)

[756] Graham, 490 U.S. at 396. (Emphasis added.)

[b6 b7C b6

]the Rules of Engagement had a significant effect on the snipers/observers' sense of danger and had encouraged their use of deadly force.[757]

[b6 b7C b6

]This inquiry finds that the Rules expanded the use of deadly force beyond the scope of the Constitution and beyond the FBI's own standard deadly force policy.[b5

]

Having made these findings, we have proposed recommendations at the conclusion of this report.[b5

,]we recommend referral of the matter of the second shot to the appropriate component of the Department of Justice for a determination of whether federal criminal prosecutive merit exists.

(4) Use of the Helicopter to Draw Subjects Out of Cabin

This inquiry found no evidence to support the allegation that the FBI intentionally used the helicopter to lure the Weavers and Harris out of the cabin so that they would be a target for HRT snipers.[b5

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we found no evidence to support allegations of the helicopter's use in such a fashion.

(5) Surrender Announcement

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There was no attempt by the FBI to give notice to the individuals in the cabin prior to the shots taken by Horiuchi. However, immediately after the shots, at approximately 6:15 p.m., two armored personnel carriers were driven to the vicinity of the cabin and a surrender announcement was made.

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The Rules of Engagement underscore the importance of the timing of the surrender announcement

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believe that more consideration should have been given to this crucial part of the operation, particularly in light of the Rules of Engagement in effect.

4. Conclusion

We find that the decision to deploy the FBI's HRT and components of the U.S. Marshals Service SOG to the Ruby Ridge crisis site was proper. However, the Rules of Engagement drafted by the FBI were improper and failed to comply with constitutional standards regarding the use of deadly force by a law enforcement officer. The Rules were also a departure from the FBI's standard policy on the use of deadly force. Implementation of such Rules may have created an atmosphere that caused an HRT sniper/observer to take a shot that he would not otherwise have taken. The imprecision of the Rules resulted in wide misunderstandings regarding the authorized use of deadly force by law enforcement personnel. In addition, the Constitution requires that surrender announcements be given, where feasible, before deadly force may be employed. For this reason, we believe that the FBI should have given a higher priority to making a surrender announcement at the earliest possible opportunity.

We believe that in examining the "totality of the circumstances" surrounding the first shot taken by the sniper/observer, the shot met the constitutional standard of "objective reasonableness." Applying the same analysis, we believe that the second shot did not meet that standard.

[ ] In this case, we conclude that the sniper/observer did not have a reasonable fear of an immediate threat to the safety of law enforcement personnel or others at the time the second shot was taken. [ ] b5

[ ] we conclude that the second shot violated the Constitution. We recommend that the circumstances surrounding the second shot be reviewed by the appropriate component of the Department of Justice for prosecutive merit.

G. FBI Internal Review of HRT Shots Taken on August 22, 1992

1. Introduction

The FBI is required to conduct an administrative inquiry into all shooting incidents in which a weapon is discharged by FBI personnel.[760] The FBI conducted an administrative inquiry of the circumstances surrounding the two HRT rifle shots on August 22, 1992 at Ruby Ridge.

The question has arisen whether the administrative inquiry conducted by the FBI's Shooting Incident Review Team ("Review Team") was sufficiently thorough. The conclusions reached in the Review Team's Shooting Incident Report have also been challenged. Problems associated with the production of the Shooting Incident Report to the prosecutors and to the defense are addressed in section IV(M) of this report.

2. Statement of Facts

When the HRT sniper/observers were removed from the mountainside on Saturday night, August 22, following the shooting, [b5

Special Agent in Charge Glenn reported the shooting incident] to FBI Headquarters shortly after it occurred on Saturday evening.[761] That notification initiated the process which resulted in the deployment of a Shooting Incident Review Team to Northern Idaho.

Before the crisis had been resolved, FBI Assistant Director Potts contacted the FBI Inspection Division to initiate an administrative inquiry into the shooting.[762] A Shooting Incident Review Team, consisting of eight supervisory and technical FBI personnel, was deployed to Ruby Ridge. They arrived at the site on August 31, shortly before Randy Weaver and his family surrendered.

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[760] Manual of Investigative Operations and Guidelines, December 19, 1986, at 1090.01.

[761] [b5]

[762] [b6 b7C]

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3. Discussion

We have concluded that the investigation conducted by the Shooting Incident Review Team was not sufficiently thorough.

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We agree with the report's findings that the first shot that struck Weaver was justified.[

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With respect to the second shot that struck Harris and Vicki Weaver, we find that the conclusion of the Review Team does not have sufficient foundation.[

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]we believe that the report lacks a sound basis for its conclusion that the second shot was justified.

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4. Conclusion

The inquiry conducted by the FBI's Shooting Incident Review Team was not sufficiently thorough. The Review Team's conclusion regarding Horiuchi's second shot did not adequately consider the circumstances that distinguished the first shot from the second.

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H. Law Enforcement Operations at Ruby Ridge From August 22, 1992 Until August 31, 1992.

1. Introduction

Following the death of Deputy Marshal Degan, the FBI assumed primary jurisdiction over the investigation of the events relating to his death. The FBI's handling of the investigation at Ruby Ridge has been criticized on several grounds: that the FBI's command and control of the crisis site was not handled properly in that insufficient emphasis was placed on negotiations to resolve the crisis;[

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Soon after learning on August 21, 1992 about the shooting incident at Ruby Ridge, U.S. Attorney Maurice Ellsworth authorized Assistant U.S. Attorney Ronald Howen to travel there to assist law enforcement personnel with legal matters. Howen arrived late in the evening of August 21st and spent the next ten days with law enforcement personnel who had responded to the crisis.

Questions have been raised as to whether it was appropriate for Howen to have been at Ruby Ridge and whether some of his activities were improper and conflicted with his role as the federal prosecutor in the case. Foremost among these allegations is that he was an active participant in tactical decisions, negotiations, and searches which transformed him into a witness in the investigation at Ruby Ridge.

2. Statement of Facts

a. Removal of Law Enforcement Personnel From the Mountain Following Horiuchi's Shots.

When the personnel carriers were near the Weaver cabin delivering the initial announcement and installing telephone communications equipment, worsening weather conditions were reported on the hill.[

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Rogers and Special Agent in Charge Glenn agreed to withdraw the sniper/observers and establish an inner perimeter around the cabin area the following morning[ ]

b5 b7C b6 [ ] The sniper/observers were withdrawn after dark on Saturday evening, August 22.[773]

[ ]

b5 b7C b6 [ ]

Upon returning to the command post after the shooting, the HRT sniper/observers were debriefed[ ] and were instructed to document their actions and observations in FD-302 investigative reports. [ ]Glenn had reported the shooting incident to FBI Headquarters earlier in the evening.

b. Command and Control Structure

The death of Deputy Marshal Degan entailed violations of federal criminal statutes that gave the FBI primary jurisdiction over the investigation.[776] Eugene Glenn, Special Agent in

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b6 b7C [772] [ ]

[773] HRT Commander Rogers testified that he originally planned to keep the sniper/observers on the mountain until 10:00 p.m. or midnight. Because of the weather, he ordered them off the mountain at approximately 8:00 p.m. Rogers Trial Testimony, June 2, 1993, at 78.

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b6 b7C [775] [ ]

[776] Local authorities maintained jurisdiction over the investigation of the other deaths and injuries that occurred at Ruby Ridge.

Charge of the FBI's Salt Lake City Division, was assigned primary responsibility for managing the federal law enforcement response to the crisis.[

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In addition to intelligence gathering, the primary concerns of local and federal law enforcement were to rescue the surviving marshals, along with the body of Deputy Marshal Degan, apprehend the subjects without further loss of life, and prevent their reinforcement by sympathizers.

State and local officers and a few representatives of the Marshals Service and the border patrol were the first law enforcement officials on the scene.[

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]Soon after, a group of interested citizens began to gather.

[

]local law enforcement agencies responded promptly and established a controlled access point at the bridge leading to the Weavers' cabin. Idaho State Police officers and a dispatcher arrived[

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.[777] On August 21, 1992, Idaho Governor Cecil Andrus declared a state of emergency in Boundary County, proclaiming that:

> the nature of the disaster is the occurrence and the imminent threat of injury and loss of life and property arising out of the standoff situation in Boundary County.[778]

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[778] See Undated Proclamation signed by Idaho Governor Cecil Andrus, August 21, 1992.

This proclamation allowed law enforcement agencies on the scene to use certain emergency services, such as Idaho National Guard resources.[779]

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Glenn arrived at the crisis site at approximately 9:30 p.m. on Friday, August 21,[ ]arrived before the FBI's Hostage Rescue Team (approximately 50 agents) and the Marshals Service Special Operations Group (approximately 58 agents).[

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[781]

When Glenn arrived, the primary goal of the law enforcement effort was to rescue the marshals on the mountain and stabilize the situation until additional federal resources arrived. Glenn ordered that a perimeter be established around the command post/staging area to ensure safety, to prevent Weaver and his associates from coming into the area during the night, and to contain a crowd of Weaver sympathizers and supporters.[782]

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b5/b7C b6 [783]

[ ] When Richard Rogers, Commander of HRT, and Duke Smith, Associate Director of the U.S. Marshals Service, arrived early Saturday morning, August 22, Glenn [ ] briefed them on the situation.[784]

[ ] On Sunday morning, a 360 degree inner perimeter around the Weaver cabin site and a forward command post near the cabin were established, and they were maintained for the remainder of the crisis.[785]

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[784] [ ]

[785] Rogers Trial Testimony, June 2, 1993, at 82-90.

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c. Tactical Operations and Discovery of Sammy Weaver's Body

b6 b7C On Sunday morning, August 23, Rogers, [ ] took two teams of HRT personnel to the vicinity of the Weaver compound in armored personnel carriers. Using a bullhorn, Rogers made repeated announcements to the Weaver cabin for about 30 minutes to convince the occupants to negotiate.[789]

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b5/b7C b6] was not present during this attempt to communicate with those inside the cabin.[790][791]

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b6 b7C On Sunday evening, August 23 [ ] personnel carriers began to remove outbuildings, such as the birthing shed and the water tanks, near

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[789] Rogers testified that he was trying to "get them to come out, pick up the phone, establish a dialogue, and let's move on with this and establish some kind of communications." Rogers Trial Testimony, June 2, 1993, at 82.

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[791] Rogers Trial Testimony, June 2, 1993, at 82-83.

b6 b7C [792] [ ]

b6 b7C [793] [ ]

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b6 b7C [795] [ ]

the Weaver cabin to protect tactical personnel, should it become necessary to mount an emergency assault on the Weaver cabin. Removal of the outbuildings would also tighten the inner perimeter around the cabin by removing visual and physical obstructions to HRT and SOG personnel.[796]

During the clearing of the birthing shed, the body of Sammy Weaver was discovered unexpectedly.[797] There is no evidence that law enforcement personnel knew of Sammy Weaver's death before this discovery.[798]

[ ] The discovery of Sammy Weaver's body brought about renewed efforts to negotiate with the Weaver group.[ ]

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[796] Rogers Trial Testimony, June 2, 1993, at 94.

[797] [ ]

[798] Rogers Trial Testimony, June 2, 1993, at 106.[ ]

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]However, there was no response from the Weaver cabin.[800]

d. Change from Rules of Engagement to the FBI Standard Deadly Force Policy

On Wednesday, August 26 at 10:53 a.m.(PDT), the Rules of Engagement in effect since the arrival of the Hostage Rescue Team were revoked. At Glenn's direction, the FBI's standard policy became the guideline for the use of deadly force by law enforcement personnel deployed on the cabin perimeter.[801]

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Rogers stated that by Wednesday the level of threat had diminished because the subjects had fired no shots since the original firefight and they had not committed any aggressive acts. HRT personnel had established well protected positions, completely surrounding the Weaver cabin. The subjects posed no immediate threat, and consequently the Rules of Engagement were changed to the FBI's standard deadly force policy. Rogers denied that the revocation of the Rules was related to the discovery of Sammy Weaver's body.[806]

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b7C [805] [ ]

[806] Rogers Trial Testimony, June 3, 1993, at 74-75. [

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e. Evidence of Vicki Weaver's Death

On Friday, August 28, at approximately 5:00 p.m., Bo Gritz, a nongovernmental negotiator started a series of discussions that ultimately led to the resolution of the crisis without additional violence. Gritz was the first person to be told that Weaver's wife was dead and the first aside from those in the cabin to observe Vicki Weaver's body.

Law enforcement personnel state that the initial evidence that Vicki Weaver was dead came in the first few moments of the first conversation Gritz had with Randy Weaver on August 28.

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[809] This conversation also confirmed that Harris had been wounded by HRT rifle shots on August 22. At the conclusion of the conversation, Gritz briefed Rogers and Glenn.

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5 U.S.C. (b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

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f. Initial Steps Toward Negotiation

On August 22, Glenn and Rogers focused much of their energy on the procurement and outfitting of two armored personnel carriers with a telephone and enough line to reach the command post from the Weaver compound, a distance of approximately one mile.

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The initial negotiations strategy was to approach the Weaver cabin, read a surrender statement over a loudspeaker, and attempt to resolve the crisis through the surrender of the Weaver group. The surrender announcement was to be read after tactical personnel had established a 360-degree perimeter around the Weaver compound. If the Weaver group did not surrender following the announcement, a hostage phone was to be delivered and telephone wire was to be laid down the mountain from the cabin to the command post.

Immediately after Horiuchi's shots, HRT Commander Richard Rogers decided to drive two armored personnel carriers to the cabin area to deliver a telephone and establish communications with those inside the cabin.[817] [

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[817] Rogers Trial Testimony, June 2, 1993, at 67-69.

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b7C b6 [ ]The telephone was placed approximately twenty yards from the cabin. Both carriers left, laying wire for the phone as they returned down the mountain. Continuous attempts to contact the Weaver group by ringing the telephone were made throughout the night. There was no response.

g. Continuing Efforts of the FBI Hostage Negotiators

In mid-morning, Sunday, August 23, following the return of the HRT sniper/observers to their positions, Rogers took the two carriers back to the position near the Weaver cabin where they had been the previous night. The telephone was in the same position they had left it the night before. This required all communication with the cabin to be made by bullhorn or megaphone. Rogers spoke to the group in the cabin for approximately 30 minutes encouraging them "to come out, pick up the phone, establish dialogue, and let's move on with this and establish some kind of communications".[819]

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Two assault teams were deployed from the carriers to establish a 360-degree cordon around the cabin. According to Rogers, the assault personnel could not be seen from the cabin. After this deployment, between 20 and 21 assault personnel were around the cabin continuously until the resolution of the crisis on August 31.[820]

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[819] Rogers Trial Testimony, June 2, 1993, at 82.

[820] Id. at 83, 90-91, 93.

b6 b7C [821] [ ]

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5 U.S.C. (b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
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5 U.S.C. 552 (b)(7)(C)

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The first contact with Randy Weaver occurred on Wednesday, August 26. In mid-morning, [redacted] told Weaver that the personnel carrier would approach the cabin to transfer the telephone to the robot and that the robot would approach the cabin with the telephone to improve communications.

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h. Efforts of Nongovernmental Negotiators

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Around 3:00 p.m. on August 26, Weaver said that he wanted to speak with his sister [redacted][828]

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827 [redacted]

828 [redacted]

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On Friday, August 28,[830] [ ] unsuccessfully tried to establish contact with her brother. Later that day, Randy Weaver stated that he would talk to Bo Gritz.[831] Glenn approached Gritz, and he offered to assist in negotiating with Weaver.[

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On Friday afternoon, Gritz was briefed by Rogers and FBI negotiators.[

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b5 Law enforcement components at Ruby Ridge[ ] first learned that Weaver, Kevin Harris, and Vicki Weaver had

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[831] Mr. Gritz was an independent candidate for President of the United States at the time.

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been shot and that Vicki Weaver was dead from Gritz' conversation with Weaver on August 28.[836]

On Saturday morning, August 29, Gritz received permission to return to the Weaver residence with[ ]a friend of the Weaver family,[

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On Sunday morning,[ ]who was assisting Gritz in his campaign for President, began assisting Gritz in the negotiations.[

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]In mid-morning, Harris decided to surrender.[840]

Gritz resumed conversations with Weaver, who agreed to the removal of Vicki Weaver's body from the cabin.[

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b5/b7C b6 [Weaver's body to the forward command post.[841]]Gritz carried Vicki

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[846]]At trial, Rogers testified that he vetoed an arrangement with

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Gritz and [ ] to overpower Weaver, if he did not surrender.[847]

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[ ]The Weaver family surrendered on August 31.[848]

i. Decision to Send Howen to Ruby Ridge

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In the afternoon of August 21 [ ] informed U.S. Attorney Ellsworth about the shooting at Ruby Ridge.[849] Shortly thereafter, Ellsworth informed Howen, the Assistant U.S. Attorney to whom the Weaver matter had been assigned, about the incident. [

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[847] Rogers Trial Testimony, June 2, 1993, at 167-68 and June 3, 1993, at 108.

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b5/b7C [ ] Howen suggested to Ellsworth that he travel to Ruby Ridge. Ellsworth agreed.[853]

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b6 b7C 859[ ]

Pages 254-257 of Report have been withheld in their entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552 (b)(7)(C)

3. Discussion

a. FBI Decision to Remove Law Enforcement Personnel From the Mountain on Saturday Night

At approximately 8:00 p.m., HRT and SOG personnel were ordered to leave their posts on the mountain and return to the command post at the base of the mountain.[890]

The articulated reason for the withdrawal of these personnel was bad weather.

He testified at trial:

> Originally, I had thought we would keep them up there until maybe 10:00 at night or maybe midnight, but probably at 8:00 or so , I ordered them to come off the mountain.[891]

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[890] Rogers Trial Testimony, June 2, 1993, at 78 ("at 8:00 or so, I ordered them to come off the mountain").

[891] Id. at 78.

The weather conditions prevented the HRT and SOG personnel posted on the mountain from remaining through the night because of the cold and the lack of visibility, which also prevented deployment of replacements.[892]

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]we believe that poor HRT command decisions unintentionally contributed to the circumstances that led to the removal of HRT personnel from the mountainside. This had an undesirable consequence: law enforcement personnel were unable to observe and contain activities in the area of the Weaver cabin during their 11 to 12 hour absence.

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[892] We were informed that the HRT sniper/observers did not have cold weather gear.

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and
5 U.S.C. 552 (b)(7)(C)

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c. FBI Attempts to Resolve the Crisis

During the Ruby Ridge crisis, the two most significant decisions made by the FBI command were the employment of Rules of Engagement, discussed in detail above, and the utilization of third party, nongovernment negotiators when communications and negotiations with the Weavers did not progress. The decision to utilize the services of Bo Gritz[ ]contributed significantly to the ultimate resolution of the crisis. Furthermore, it showed flexibility in strategy and was an example of sound management.

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Communications between the negotiators and those inside the cabin were also hindered by the poor performance of communication devices employed during the negotiations.[

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The failure of on-site supervisors to communicate accurate information appears to have had a negative impact on the attempt to resolve the crisis through negotiation.

(2) Balance of Tactical and Negotiation Strategies

In a crisis situation in which a deliberate assault option is considered a necessary part of overall strategy, a written operational plan for the assault must be submitted to FBI Headquarters for approval. On the other hand, emergency tactical operations, whether or not they will contribute to the ultimate resolution of the crisis, are the responsibility of both the Special Agents in Charge and the HRT command structure at the crisis site.

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While we credit the argument that it was necessary to secure the site before negotiations could commence, we find much evidence that a negotiation strategy was not the highest priority of the FBI crisis management team.[

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d. Evidence of Vicki Weaver's Death

It has been alleged that law enforcement officials knew that Vicki Weaver was dead before Randy Weaver spoke with Bo Gritz on August 28. The allegation accuses the FBI of covering up its knowledge of Vicki Weaver's death in order to conceal that it intentionally shot and killed her. We find no factual support for that position and find that the allegation is totally without merit.

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It is the conclusion of this inquiry that law enforcement personnel did not know of Vicki Weaver's death before Friday, August 28 when Randy Weaver informed Bo Gritz.

e. Howen's Activities at Ruby Ridge

Howen was present throughout the crisis at Ruby Ridge. We find nothing inappropriate about his presence or his conduct. Indeed, considering the remoteness of the Weaver property and the need for expeditious applications for search warrants and Title III authority, we believe that there was a legitimate need for a representative of the U.S. Attorney to be at Ruby Ridge. [

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b5/b7C] He was present at some of the interviews of the marshals, but primarily as an observer. The fact that he may have asked some questions and may have taken some notes was not improper. [

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] there was no evidence that these conversations were improper. [

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,] there was no evidence that Howen was in a position of control at Ruby Ridge or that he exercised a decisionmaking function. No evidence was discovered that Howen had any role in the decision to deploy HRT or in the formulation or modification of the Rules of Engagement. [

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Similarly, there is no evidence that Howen acted improperly at walk throughs and searches or that he controlled the searches or selected the investigative methodology. [ ]

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We believe that, in the future, serious consideration should be given to including a representative from the U.S. Attorney's Office to law enforcement teams responding to crises like Ruby Ridge. The representative could assist law enforcement personnel in many matters such as participating in resolving the controversy and providing legal advice about issues arising during the crisis. We recognize, however, that in many instances the representative should not be the attorney responsible for prosecuting the case because this could lead to the charge that the prosecutor was a witness to the critical events at issue.

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4. Conclusion

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The FBI management team favored a tactical strategy and gave insufficient consideration to negotiations as a means to resolve the crisis. Negotiation experts at the site were not adequately informed and consulted during the crisis.[

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The late decision to use third party non-governmental negotiators was a sound management decision that displayed flexibility on the part of FBI management. Finally, Howen's conduct was proper and consistent with the role of a federal prosecutor.[

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I. FBI Crime Scene Investigation

1. Introduction

The investigation of the events at Ruby Ridge from August 21-August 31, 1992, included several searches and attempts to gather evidence. There were three primary crime scenes and search areas. The first crime scene was at the intersection of two old logging roads known as the "Y"; the second was the Weaver cabin; and the third was the area around the cabin, including out buildings such as the birthing shed. During the searches of the crime scenes, a wide variety of objects was retrieved for use as evidence in the Weaver prosecution.

This section will address various allegations of errors, omissions, and misconduct relating to the crime scene searches. There have been allegations that the measurements taken during the searches were inaccurate; that the FBI staged or planted evidence; that the personnel, techniques, and equipment employed in the searches were inadequate because they lacked the requisite competence or technical efficiency; that third parties were allowed to infect the crime scene to cover up the government's wrongful conduct; and that the integrity of the crime scenes was not maintained.

2. Statement of Facts

a. Background

The FBI conducted searches of the Y area on August 24, August 27-31 and September 1, 1992. The FBI supervised searches of the Weaver cabin, grounds, and outbuildings on August 31 and September 1 and September 10, 1992. An additional search of the Y and the Weaver cabin and grounds was conducted on March 22 and March 23, 1993. The search teams consisted primarily of FBI personnel from the Salt Lake City and Seattle Divisions and the FBI Laboratory, augmented by personnel from the U.S. Marshals Service, the Bureau of Alcohol, Tobacco and Firearms, the Idaho Bureau of Investigation, and the Boundary County Sheriff's Office.

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(2) The "Magic" Bullet

During the search of the Y crime scene on August 31, the

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Considerable interest has been generated about an intact bullet [ ] discovered at the center of the Y during this search. This bullet was designated "L-1" and was referred to by defense counsel as the "magic bullet."

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[ ]937[ ]recalled that[ ]had from the FBI Laboratory photograph the bullet. Later[ ]realized that[ ]needed to obtain a letter designation from the photographer and then have a new picture taken with the letter designation.[938] b6 b7C [ ]Thereafter,[ ]was instructed to end the search and return to the command post for a briefing.

[ ]

Before leaving the Y area,[ ]picked up the L-1 bullet, marked it, and placed it in a plastic envelope that he put in his pocket.

After assisting in the search of the Weaver cabin,[ ]asked[ ]to return with[ ]to where the bullet had been found.[ ]was told to photograph the spot.[939]

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938 See discussion in Section IV(O).

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d. Searches of the Cabin and Surrounding Area

After Weaver and his family had surrendered, the cabin was searched on August 31, September 1, and September 10, 1992.[

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3. Discussion

a. Techniques Employed to Locate Evidence

The searches of the area near the Weaver residence, including the Y, coordinated by the FBI, have been criticized as disorganized, confused, and unsecured.[963]

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c. The "Magic Bullet" and Allegations of Staged Evidence

The events surrounding the discovery and retrieval of the "magic bullet" generated allegations of staged or manipulated evidence.[969] We have not found evidence of intentional concealment, staging, or a lack of a good faith on the part of the FBI or the other law enforcement agencies that assisted in the searches. However, we believe that poor judgment by those who conducted the crime scene searches created confusion and, as manifested by the "magic bullet" episode, that poor judgment harmed the government's case.

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[969] For a discussion of the controversy at trial involving photographs of this bullet see Section IV(O).

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4. Conclusion

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In our view, three factors contributed significantly to the difficulty of conducting the crime scene searches. First, the searches were conducted during an ongoing effort to resolve the crisis. Second, an unusually large number of law enforcement personnel from a wide variety of federal, state, and local law enforcement components were at the site, adding to the confusion and congestion. Third, the terrain was extremely rough, uneven, and covered with dense foliage.

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Many of the problems that attended the crime-scene searches could have been avoided had an experienced evidence-recovery team been summoned. [

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] The use of the Evidence Response Team would certainly have added badly needed experience and expertise to the investigation and may very well have alleviated a number of the problems that we discuss here. The Ruby Ridge crime scene investigation was difficult. Those who conducted the search had participated in the tiring, tension filled operation that ultimately resolved the standoff. As a consequence, some aspects of the crime-scene search were confused and incomplete. The utilization of sophisticated, professional, evidence location, retrieval, identification, and preservation techniques in this case was necessary.

J. The FBI Laboratory

1. Introduction

The U.S. Attorney's Office for the District of Idaho ("USAO"), components of the FBI, the U.S. Marshals Service, local law enforcement agencies, and the trial court all criticized the performance of the FBI Laboratory ("Laboratory") during the course of the Weaver trial. In this section, we will examine the timeliness and quality of the Laboratory's response to requests for tests, its refusal to perform certain tests, and its neglect to do others.

2. Statement of Facts

a. FBI Laboratory Processing Procedure

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] It is FBI policy that when the Laboratory receives a request from a field office to examine evidence, a principal examiner is assigned to the matter. The examiner assigns a priority to the request. Cases for which the FBI is primarily responsible are given the highest priority, followed by cases involving violent crimes, cases involving crimes against property, and cases in which a judicial proceeding is unlikely. In practice, we found that pendency of a trial date is the overriding factor determining whether a case becomes a priority.

The principal examiner forwards items of evidence to the appropriate unit within the Laboratory, prepares a report when the examination has been completed, and returns the items to the field office with the report.

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] The Laboratory generated twelve reports in the Weaver matter.

b. Timeliness and Neglected Tests

On January 8, 1993, a conference was held in the chambers of U.S. District Court Judge Lodge. The defense requested that the trial date of February 2, 1993 be postponed because of the volume of information and documents to be reviewed and because not all of the Laboratory examinations had been completed. Judge Lodge admonished the government to provide the results of the examinations quickly. Assistant U.S. Attorney Howen told the court that he was attempting to comply with the court's instructions, but that he had no control over the delay caused by the FBI Laboratory.[975]

Following Weaver's sentencing, Judge Lodge issued a contempt order against the FBI and levied a fine because the prosecution had "receiv[ed] less than full cooperation from the FBI" and the Bureau had not produced items of evidence "timely."[976] The court referred to the FBI's "recalcitrance" and held that the Bureau had "evidence[d] a callous disregard for the rights of the defendants and the interests of justice and demonstrate[d] a complete lack of respect for the order and directions of [the] court."[977]

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[975] Transcript of proceedings in United States v. Randall C. Weaver and Kevin L. Harris, CR 92-080-N-EJL, on January 8, 1993.

[976] Order, October 26, 1993, at 2.

[977] Id. at 10, 13.

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After the chambers conference, the FBI Laboratory received eight requests for examinations in the Weaver matter,[980]

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The first examination that appears to have been neglected was a request on August 27, 1992 to determine whether two pieces of metal were once part of Degan's canteen clip. The second neglected examination was a request on September 9 to compare blood samples of Vicki and Sammy Weaver with blood found on two jackets and a pair of pants.[981] The third was a request on

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October 28 to determine whether holes in Degan's backpack and the clothing it contained had been caused by a bullet.[982]

There was no response to these requests in the Laboratory report of December 23, 1992. The field office again requested these examinations on January 5, 1993. The Laboratory responded on January 22. A more detailed discussion of these tests follows.

(1) Degan's Backpack

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(2) Blood and Hair Examinations

After being retrieved from Ruby Ridge, Deputy Marshal Degan's body was taken to a morgue for an autopsy, which was performed on August 22, 1992[

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The FBI Hostage Rescue Team discovered Sammy Weaver's body, while clearing the birthing shed near the Weaver cabin on August 23, 1992. [redacted] conducted an autopsy on August 25.

On August 31, 1992, [redacted] conducted an autopsy of Vicki Weaver's body, [redacted]

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986 [redacted]

987 [redacted]

988 [redacted]

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On January 4, 1993, blood samples taken from Degan, Sammy Weaver and Vicki Weaver were obtained from and sent to the Laboratory.[994] The examinations were completed and reported on January 21. On January 28, pursuant to a court order, samples of Harris' hair were taken and forwarded to the FBI Laboratory.

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When the FBI Laboratory received a request for additional blood and hair comparisons on January 5, 1993, realized

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that the FBI did not have the blood samples. The samples were submitted on January 6.[995] The examinations were completed and provided to the USAO on January 15 and given to the defense on January 27.

c. Refusal to Perform Tests and Hiring of Independent Experts

In one instance, the Laboratory refused to conduct a requested examination and, in several instances, the Laboratory determined that certain examinations were not possible.

During trial preparation, the USAO entered into contracts with three forensic specialists:[b6 b7C] these people were retained because the FBI Laboratory was unwilling or unable to provide assistance in their areas of expertise.[996]

(1) Refusal to Conduct Test

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(2) Shooting Reconstruction

[b6 b7C] told the FBI case agents that the case needed an expert to reconstruct the shooting events at the Y on August 21 to corroborate the marshals' testimony. The agents replied that "there's no such thing."

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b7C [ ] a shooting reconstructionist, on the basis of the physical evidence, can determine, among other things, the "directionality" of a bullet's trajectory.[998]

[ ] called the FBI Laboratory and was told that the Laboratory does not do shooting reconstructions.[ ]

b5/b7C/b6 [ ] to find one of the best shooting reconstructionists in the country[ ]

[ ] was told that the Laboratory did do shooting reconstruction[ ]

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(3) Wound Ballistics and Metal Detection

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(4) Acoustic Testing

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] See Section IV(N) of this report for additional discussion about this acoustical test.

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d. Failure to Comply with Discovery

b6 b7C The final issue raised by Judge Lodge about the FBI Laboratory concerns the mailing of notes and test firings of the weapons. The defense orally requested production of notes and the test firings at the end of the first week or the beginning of the second week in May 1992.

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] The prosecution advised the court that the test firings were available for defense review

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b6 b7C on May 18. [ ] this delayed the trial and produced additional discovery problems.

3. Discussion

In analyzing the performance of the FBI Laboratory, we interviewed field and Laboratory personnel; analyzed field communications requesting examinations and transmitting physical evidence; audited Laboratory reports and tracking of examined articles; assessed criticisms by agencies and interested parties; inspected the crime scenes; and reviewed grand jury testimony, court proceedings, and autopsy reports.

a. Problems with Delays in Test Results

Our investigation revealed that Judge Lodge, as well as the trial team, the FBI field agents, and their supervisors were not satisfied with the response of the FBI Laboratory in this case.[1008] In exploring the delays in conducting and reporting examinations, we discovered a lack of coordination, communication, and cooperation within the FBI. Unfortunately, these delays had significant impact on the government's discovery obligations and the way the government was perceived by the court and at trial.

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When Laboratory tests require additional evidence or specific instructions, communication with the most knowledgeable people, the case agents or the prosecutors, should be continuous.

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We are not convinced that the delays were the result of unnecessary requests by the prosecution team. Rather, we find a lack of initiative by the Laboratory in conducting examinations beyond the specific request. The use of private experts apparently renewed the Laboratory's interest in and commitment to the case. That was a costly and unnecessary expense. Our inquiry found that nothing done by the independent examiners fell outside the FBI's expertise.

In addition we find that the Laboratory's failure to respond in a timely manner contributed to the trial judge's perception that the government was not meeting its discovery obligations. Although the FBI Laboratory did much significant and professional work, the problems apparent in delays and lack of initiative should be remedied.[

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b. Failure To Provide Expertise and the Hiring of Independent Experts

Our investigation revealed a lack of cooperation and initiative by the Laboratory beyond specific tests requested. We found that the requisite expertise was present at the Laboratory, but it was something that the USAO had to discover.[

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We believe a more coordinated, professional, creative, and cooperative approach to litigation and investigations would be far more helpful than the process we discovered in the Weaver matter.

c. Discovery Demand for Test Firings and Laboratory Notes

Our investigation found that the delay in turning over Laboratory notes and test firings was one of several examples of the FBI resistance to, disagreement with, and misunderstanding of its discovery obligations in the Weaver case. We found the FBI's actions and decisions inappropriate.

We found no evidence that the delays in the Laboratory tests were designed or intended to postpone the trial or obstruct justice.

4. Conclusion

The lack of coordination and communication both within the FBI and with the USAO appears to be the major cause of the delays and the other problems examined in this section of the report.

K. The Preliminary Hearings of Weaver and Harris

1. Introduction

Following their arrests, government agents transported Weaver and Harris to hospitals to receive medical treatment for the gunshot wounds that they had suffered. Thereafter, the court decided to conduct separate preliminary hearings for the two men. In addition, the federal magistrate judges handling the preliminary hearings elected to combine the preliminary examination and detention hearing in one proceeding. The combined preliminary examination and detention hearing for Weaver was scheduled to begin on September 10, 1992; the combined preliminary examination and detention hearing for Harris was scheduled to begin on September 14, 1992.

On Friday, September 11, 1992, one day after the Weaver preliminary hearing had begun, U.S. Attorney Ellsworth appeared in court to argue a motion seeking to continue the preliminary hearing of Harris from September 14 to September 15 in order to accommodate the additional security needs presented by the visit of Vice President Quayle to Boise on September 14. It has been alleged that Ellsworth represented in court that Harris would be permitted a full preliminary hearing that would not be terminated or interrupted by the return of a grand jury indictment. With the understanding that a full preliminary hearing would be conducted, counsel for Harris consented to the continuance.

The preliminary hearing of Harris began on September 15. On the second day of the preliminary hearing, the proceedings were interrupted by Assistant U.S. Attorney Ronald Howen, who informed the court that the grand jury had just returned an indictment against Weaver and Harris. The Weaver preliminary hearing was also interrupted and the parties informed of the indictment. Although the magistrate judges ultimately decided to discontinue the preliminary hearings, they afforded Weaver and Harris the opportunity to question witnesses during the detention phase of the hearings.

It has been alleged that the government acted improperly when it sought grand jury indictments while the preliminary hearings were in progress. In particular, it has been argued that once the government elected to proceed by preliminary hearing, it was estopped from abandoning the preliminary hearing. With regard to the Harris preliminary proceeding, the question has been raised whether the government, in light of the Ellsworth representations, was obliged to complete the preliminary hearing and whether the failure to do so violated any legal or ethical rules.

2. Statement of Facts

a. Arrest and Initial Processing of Weaver and Harris

On August 23, 1992, a criminal complaint was filed charging Weaver and Harris with violations of 18 U.S.C. §§ 111, 1111 and 1114. Harris surrendered to federal authorities on August 30, and was taken for medical treatment to the intensive care unit at Sacred Heart Medical Center in Spokane, Washington. The next day, Weaver surrendered and was taken to St. Lukes Hospital in Boise for treatment. On September 2, 1992, U.S. Magistrate Judge Cynthia Imbrogno conducted the initial appearance of Harris in the hospital and continued his preliminary examination and detention hearing until September 14 because of his medical condition.

Assistant U.S. Attorney Howen originally planned to conduct joint preliminary hearings for Weaver and Harris but the delay caused by the medical treatment for Harris, coupled with federal time requirements, precluded this plan.[1015] As a result, the preliminary hearing for Weaver was scheduled for September 10th before Magistrate Judge Mikel Williams and the preliminary hearing for Harris was scheduled for September 14 before Magistrate Judge Lawrence Boyle. The magistrate judges decided to conduct the preliminary hearing and detention hearing in one proceeding.

Howen was assigned to handle the Harris preliminary hearing while Assistant U.S. Attorney Lindquist was assigned to handle the Weaver preliminary hearing.[1016] [

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[1015] See Transcript of Preliminary Hearing in United States v. Harris, MS 3934, September 16, 1992, at 43 (hereinafter cited as "Harris Preliminary Hearing Transcript"). Pursuant to Fed. R. Crim. P. 5 and 18 U.S.C. § 3060, the preliminary examinations needed to be conducted within 10 days of arrest. Rule 5 provides that a defendant charged with a nonpetty offense is entitled to a preliminary examination, "within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody . . . provided, however, that the preliminary examination shall not be held if the defendant is indicted . . . ." A federal magistrate judge may extend the time limits if the defendant consents to the extension or if a showing is made that "extraordinary circumstances exist and that delay is indispensable to the interests of justice."

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b. September 10-11, 1992

The combined preliminary examination and detention hearing for Weaver began on September 10. On that day the government spent the entire day examining Deputy Marshal Roderick.[1025] When the preliminary hearing resumed on September 11, defense counsel cross-examined Roderick and, in the afternoon, the government conducted the direct examination of Deputy Marshal Cooper. At the end of the proceedings on September 11, it was agreed, at the request of defense counsel Gerry Spence, that the hearing would resume on September 16, 1992.[1026]

On Friday September 11, 1992, three days before the Harris preliminary hearing was to commence, U.S. Attorney Ellsworth, filed a motion and a supporting affidavit requesting that the Harris preliminary hearing be continued one day until September 15. Ellsworth explained that the Boise Chief of Police had expressed concern to him about being able to provide security to both the Harris preliminary hearing and to Vice President Quayle who was scheduled to visit Boise on September 14.[1027] In arguing the motion to the court, Ellsworth[1028] told the court that the U.S. Secret Service had also expressed concern over the increased security demands created by the Quayle visit.[1029] When Judge Boyle asked for Harris' position on the continuance, defense counsel Nevin replied:

> The primary concern that I have is that this not be simply an opportunity for the government to get a grand jury impaneled and to indict Mr. Harris and avoid the obligation to provide him with a preliminary hearing. And I've been afraid all along that was what was

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[1025] See Transcript of Preliminary Hearing in United States v. Weaver, No. MS-3934, September 10, 1992 (hereinafter cited as "Weaver Preliminary Hearing Transcript").

b6 b7C [1026] [ ]

[1027] See Motion to Vacate and Continue Preliminary and Detention Hearings, United States v. Harris, No. MS-3934, filed on September 11, 1992; Affidavit of Maurice O. Ellsworth, United States v. Harris, No. MS-3934, September 10, 1992. [ ]

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[1028] Ellsworth was arguing the motion because the Assistant U.S. Attorneys assigned to the case were unavailable. [ ]

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[1029] See Transcript of Motion Hearing, United States v. Harris, No. MS-3934, September 11, 1992, at 7.

> going to happen and that this would get delayed in some way so that would be possible.
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> I understand . . . this is approximately the time when the grand jury sits and is available. And if this is just an effort to do that, then I certainly object to it.
>
> Now maybe Mr. Ellsworth could assure us or we could stipulate that a preliminary will be held on Tuesday and that there will not be an indictment filed which would supersede that, and in that case I would be glad to stipulate to it.[1030]

The court then invited comment from the Government to which Ellsworth responded:

> As indicated in my affidavit there is no underlying basis for this . . .beyond the representations to me of the chief of police of Boise. . . . [W]e are prepared and ready to go to the preliminary hearing on Monday. I am willing to give assurances that we intend to have a preliminary hearing and there is no ulterior motive other than the request of the chief of police of Boise that the -- he's concerned about his security people. . . .But there is no ulterior motive other than what's expressed in the motion and affidavit.[1031]

Thereafter, the following exchange occurred between the parties and the court,

> THE COURT: Okay. Do you gentlemen want to take a minute and talk privately and then I can come back in?
>
> MR. NEVIN: Yeah, I mean if -- if what counsel is saying is that there is going to be a preliminary hearing on Tuesday no matter what, why that's fine. I -- we --no objection.
>
> THE COURT: So you would agree and stipulate to --
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> MR. NEVIN: Yeah.

[1030] Id. at 5-6.

[1031] Id. at 6-7.

THE COURT: -- to postpone the preliminary examination and detention hearing from Monday the 14th to Tuesday the 15th?

MR. NEVIN: Upon that condition, yes.

* * * * * *

MR. ELLSWORTH: The government has no problem with that stipulation.

THE COURT: All right. Well, let me just understand so I don't make a procedural mistake. And is it my understanding Mr. Nevin, that you agree based on the representations of the United States attorney that their motive is simply to honor requests by the chief of police regarding Mr. Quayle's visit to Boise, you will stipulate for a transfer of this -- or rescheduling of this from Monday until Tuesday?

MR. NEVIN: Yeah. And just so I don't make a mistake in what I'm saying. I read what Mr. Ellsworth has said as a guaranty that we'll have a prelim on Tuesday, and that there -- this is not an attempt to delay this proceeding so that an indictment could be filed or the grand jury could be impaneled, whatever. And that we will have a preliminary hearing on Tuesday no matter what. And upon that representation I stipulate that the matter may be continued until Tuesday.

THE COURT: Okay, you're not asking as a condition of your stipulation that they not subsequently impanel a grand jury and return an indictment if that's such?

MR. NEVIN: Yeah. No, I don't consider that to be part of our stipulation.

THE COURT: All right. Mr. Ellsworth, is that agreement adequate for you?

MR. ELLSWORTH: I have no problem with that agreement, Your Honor. . . .[1032]

[1032] Id. at 7-9.

Thereafter, Judge Boyle granted the motion to continue the preliminary hearing until September 15.[1033]

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[1033] Id. at 10.

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in its entirety
pursuant to
5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

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(2) Beginning of the Harris Preliminary Hearing

The preliminary hearing of Harris began on September 15. For the first two hours, Howen argued 10 motions that the government had filed late the previous day.[1045] Thereafter, Lindquist spent the remaining part of the day conducting the direct examination of Special Agent Gregory Rampton while Howen left the hearing and presented witnesses before the grand jury in another room in the courthouse.

At the end of the proceedings on September 15, Lindquist informed the court that he had a scheduling conflict if the Harris preliminary hearing continued the next day since he was supposed to participate in the Weaver preliminary hearing. Lindquist explained that Howen was unavailable to conduct either hearing because, "we have the grand jury convened, which is going to demand his time."[1046] As a result, Lindquist requested that the Harris hearing be continued. After defense counsel objected to the request,[1047] the following colloquy occurred:

> MR. NEVIN: . . . . The -- I have been concerned all through this, that where the United States was going was a grand jury indictment, and then an argument that would cut off our right to have a preliminary hearing.

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[1045] The judge interrupted Howen early in his argument and stated that, "[w]e had a hearing last Thursday, September 10, where many of the issues you are raising today were argued by very able counsel for the Government." Harris Preliminary Hearing Transcript, September 15, 1992, at 12. Later, after Howen had finished arguing another point, the judge stated, "I believe that is consistent with, Mr. Howen, what I told counsel in our conference this morning. I think that you have just merely restated what I told you my position was." Id. at 38. Notwithstanding these remarks, Judge Boyle later refused to become involved in a debate as to whether the USAO had been attempting to delay the proceedings. Id., September 16, 1992, at 68.

[1046] Id., September 15, 1992, at 226.

[1047] Id.

> When we appeared in Court last Thursday, Mr. Ellsworth was there, and Mr. Ellsworth was there on a motion to continue these proceedings from yesterday until today.
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> I said at that time, that was what I was afraid they were doing, and that if they would guarantee me that was not what they were doing, and that we would go forward with a preliminary hearing, no matter what, they holding it at another time was fine with me.
>
> I went outside here, and I saw grand jury witnesses going into the grand jury room, I know that's what they are doing. We've been told Mr. Howen can't be here tomorrow because he's got to appear before, and again that's a choice they have made for him to be there instead of here.
>
> But, in any event, if counsel will assure me that we will hold and complete this preliminary hearing, I don't mind if we continue it until a later time, and that there will be no argument upon -- if a grand jury indictment is returned, that we're not entitled to complete this hearing. And upon that insurance, let's hold it another time, whenever it's convenient, that's fine. . . .
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> MR. LINDQUIST: . . . [C]ounsel will not have that assurance. We're all very much aware that the purpose of a preliminary hearing does not result in a charging document. The purpose is to get us to that grand jury, which is the institution that initiates the charging document. . . .
>
> I'm simply saying that we are proceeding with the grand jury as it is convened, pursuant to Court order, and I'm not going to make any commitment as to what that grand jury will do. That is not in my power. That's not my authority.[1048]

The court then asked Lindquist whether he had "visited with Mr. Ellsworth about the nature of the hearing held last week on this very question," to which Lindquist replied that he had "about a two-minute meeting" with Ellsworth and had simply learned that

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[1048] Id. at 228-30.

defense counsel was cynical about the reasons Ellsworth had given for the continuance. Having ordered that the preliminary hearing reconvene the next morning, the court explained that it was going to "pull out the tape" of the earlier hearing because it believed that Ellsworth had represented that "there would be a complete preliminary hearing held in this matter."[1049]

d. September 16, 1992

(1) Proceedings Before the Grand Jury

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[1051] Thereafter, the grand jury deliberated and returned two indictments against Weaver and Harris charging them with violations of 18 U.S.C. §§ 1, 115, 1111 and 1114.

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[1049] Id. at 230-33.

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(2) Harris Preliminary Hearing

The Harris preliminary hearing resumed on September 16 with
b6 the defense examining its first witness, Deputy Marshal Hunt.
b7C Assistant U.S. Attorney [ ] handled the proceeding while Lindquist continued to handle the Weaver preliminary hearing and Howen was before the grand jury.[1056] In the middle of the morning session, Howen interrupted the proceedings and informed the court that the grand jury had returned two indictments against Weaver and Harris.[1057] Howen requested immediate arraignment. Thereafter, the court declared a 10 minute recess. When court resumed, Howen stated that he had not been present in court when certain conversations occurred between the court and Ellsworth. The court then took another brief recess to allow Howen to review a transcript of the September 11 hearing

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[1057] The first indictment charged them with the willful, malicious and premeditated murder of William Degan in violation of 18 U.S.C. §§ 2, 115, 111 and 1114 the second indictment charged them with forcibly resisting, impeding and assaulting Deputy Marshals Roderick, Cooper and Degan in violation of 18 U.S.C. §§ 2 and 111.

transcribed by the judge's secretary the previous evening.[1058]

When the proceedings resumed, Judge Boyle made it clear that he considered the initial appearance of Harris to have been at the Spokane hospital on August 30, 1991 before Judge Imbrogno and, therefore, that the time requirements of Fed. R. Crim. P. began to run from that date.[1059] Howen then argued that the case would have been indicted the prior week if the court had not delayed the impaneling of the grand jury for one week because of the Labor Day holiday.[1060] Howen then admitted that Ellsworth "did guarantee a preliminary hearing" but argued "[w]e appeared for the preliminary hearing. We've gone through a full day of a preliminary hearing. . . . [W]e think at this time, with the return of the indictments. . . the preliminary hearing now should go on to the detention hearing. . . ."[1061]

Although Judge Boyle concluded that Ellsworth had moved for the continuance in good faith and seemed to agree that, as a legal matter, the return of an indictment extinguished the right to a preliminary hearing, he was concerned that the Ellsworth representations might have estopped the government from indicting Harris.[1062] In response, Howen adopted a narrow reading of the September 11 transcript and argued that preliminary hearings are typically brief and that all that Ellsworth was promising was that a preliminary hearing would be held on September 15[1063] and that because a hearing had been held on that day, the Government was not estopped from indicting Harris.[1064] Howen denied having any improper motive in presenting the indictment to the grand jury and argued that because the defendants were in custody, they had a right to immediate presentment before a grand jury and indeed, that the Speedy Trial Act mandated that they be brought before a grand jury within 30 days of arrest.[1065]

[1058] Harris Preliminary Hearing Transcript, September 16, 1992, at 23-25.

[1059] Id. at 27-29.

[1060] Id. at 33-37.

[1061] Id. at 37.

[1062] Id. at 35-39.

[1063] Id. at 39-40.

[1064] Id. at 48-50, 90-91.

[1065] Id. at 44-45.

Defense counsel Nevin argued that this matter was not dependent upon the statutory provisions and caselaw that held that an indictment extinguished the right to a preliminary hearing but rather was dependent upon the effect to be given Harris' waiver of a right to object to a continuance in return for a promise by the U.S. Attorney that Harris would have a preliminary hearing.[1066] Nevin, pointing to the lengthy argument of motions and the lengthy direct examination of Rampton, argued that Howen had no intention of completing the preliminary hearing on September 15, 1992.[1067] He maintained that the clear import of what was stated in court on September 11th was that in return for Harris' consent to continuing the preliminary hearing the government agreed to give Harris a full preliminary hearing without interrupting it with the return of an indictment.[1068] Thereafter, Nevin moved to quash the indictment.

After listening to the arguments of the parties, the court took the matter under advisement and commenced the detention phase of the hearing.[1069] Thereafter, the government resumed its direct questioning of Special Agent Rampton after which defense counsel cross examined Rampton.

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[1066] Id. at 53-54.

[1067] Id. at 54-55.

[1068] Id. at 56.

[1069] Id. at 100.

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(3) Weaver Preliminary Hearing

On September 16, the preliminary hearing of Weaver resumed. However, before defense counsel began to cross-examine Deputy Marshal Cooper, Lindquist informed the court and defense counsel that a grand jury had been convened and would be handing down an indictment that day.[1074] Shortly thereafter, an indictment was served on Weaver and the court heard argument from the parties as to whether the preliminary hearing should be continued. The court then permitted defense counsel to cross examine Cooper before ruling that the preliminary hearing was being terminated. Judge Williams concluded that the grand jury's finding of probable cause obviated the need for the preliminary hearing and opined that the issue of prosecutorial misconduct could be addressed by motion with the district court judge.[1075] Thereafter, the court proceeded to the detention

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[1074] See Affidavit of Charles F. Peterson in Support of Motion to Dismiss Indictment and to Remand for Preliminary Hearing, filed November 16, 1992, at 2.

[1075] Weaver Preliminary Hearing Transcript, September 16, 1991, at 157-158.

phase of the proceedings. Lindquist rested after introducing a few exhibits; defense counsel called no additional witnesses. The court ordered that Weaver be detained.[1076]

e. September 17, 1992

On September 17, the court ruled on the Harris motion to quash the indictment. Judge Boyle concluded that although he "truly believe[d]" that Ellsworth had made the request for a continuance in good faith, he interpreted "the stipulation entered into between counsel as contemplating that Mr. Harris would be entitled to a preliminary examination."[1077] With regard to what legal effect should be given the breach of the agreement, including whether it warranted quashing the indictment, Judge Boyle thought that the issue was better left to a superseding proceeding or appeal. However, he did not believe that Harris had been prejudiced by how the preliminary and detention hearings were conducted.[1078] The court concluded that the return of the indictment extinguished the need for the preliminary hearing since the grand jury had performed the purpose of the preliminary hearing which was to determine whether probable cause existed that a crime had been committed and that Harris had committed it. As a result, Judge Boyle held that the preliminary hearing would not continue.[1079]

Thereafter, the court began the detention phase of the hearing and defense counsel proceeded to cross-examine Special Agent Rampton. After Rampton completed his testimony, defense counsel called and questioned Deputy Marshals Dave Hunt, Arthur Roderick, Larry Cooper, Joseph Thomas and Francis Norris. Following argument by counsel, Judge Boyle ordered that Harris be detained.[1080]

[1076] Id. at 184.

[1077] See Harris Preliminary Hearing Transcript, September 17, 1992, at 4.

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[1079] Harris Preliminary Hearing Transcript, September 17, 1992, at 5-9. Magistrate Judge Williams denied a similar motion filed by Weaver. See Order, United States v. Weaver, No. MS-3934, filed on September 17, 1992.

[1080] Harris Preliminary Hearing Transcript, September 17, 1992, at 208-15.

f. Subsequent Defense Challenges

On November 16, 1992, Weaver and Harris sought to dismiss the indictments returned against them, arguing, among other grounds that the preliminary hearing had been improperly terminated. They asserted that the Government improperly obtained the indictments only after it realized that probable cause had not been demonstrated at the preliminary hearings because none of the witnesses offered had seen either defendant fire the shot that killed Degan. In addition, they argued that once the Government elected to proceed against the defendant by preliminary hearing it should "be estopped from abandoning that proceeding."[1081] To hold otherwise, in their view, would permit the Government to abuse the preliminary hearing, if it appeared that the defense might prevail, in violation of the due process rights of the defendants to introduce evidence.[1082] Harris also contended that dismissal was warranted in his case since his consent to a continuance had been secured by a false promise that the hearing would not be superseded by an indictment.[1083]

The Government filed its response to the Weaver and Harris motions to dismiss on November 23, 1992 and argued that there was no legal authority to support the proposition that it was unconstitutional for the prosecution to have the grand jury return an indictment while a preliminary hearing was in progress.[1084] Furthermore, the Government noted that Weaver had requested the continuance of the preliminary hearing from September 11, 1992 to September 16, 1992.[1085] The Government

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[1081] See Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment and to Remand for Preliminary Hearing, United States v. Weaver, filed November 14, 1992, at 4.

[1082] Id. at 3-5.

[1083] See Affidavit of David Z. Nevin, United States v. Harris, dated September 16, 1992, at 3; Motion to Dismiss, United States v. Harris, filed November 16, 1992, at 1-2.

[1084] Government Response to Motion to Dismiss Indictment and to Remand for Preliminary Hearing, United States v. Weaver, filed November 23, 1992, at 1-2.

[1085] Id. at 2. The Government also noted that normally the grand jury for the District of Idaho would meet on the second Tuesday of each month but could not do so in September 1992 because of delay caused by the Labor Day holiday and the need to swear in a new grand jury. If this delay had not occurred, the grand jury would have met on September 8th and returned the

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failed to address directly Harris' argument that the Government had represented that an indictment would not be returned prior to the completion of the preliminary hearing. It did, however, argue that Harris had been afforded a complete preliminary hearing that was completed on September 17, 1992, one day after the indictment had been returned.[1086]

Magistrate Judge Williams concluded that the U.S. Attorney's Office had acted within the scope of the applicable laws and was not guilty of prosecutorial misconduct. In addition, he concluded that there was no legal barrier to an indictment being returned prior to the completion of the preliminary hearing. Once the indictment was returned, the need for the probable cause determination of the preliminary hearing became unnecessary.[1087]

Shortly thereafter, Magistrate Judge Boyle ruled on the claims made by Harris in his Motion to Dismiss.[1088] In that opinion, Judge Boyle adhered to his earlier ruling on the issue and reiterated his conclusion that there was no legal impediment to a grand jury returning an indictment while a preliminary hearing was in progress.[1089] In addition, Judge Boyle found that Harris had failed to demonstrate that he had been deprived of any constitutional or procedural right or that he had suffered

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indictment before the preliminary hearing had begun. It was the Government's contention that the defense had attempted to manipulate the preliminary hearing proceedings so as "to frustrate and prevent the orderly receipt of evidence and testimony by the Grand Jury" and that its request for a remand for further preliminary hearing was no more that a discovery device since they had been unable to satisfy the deposition requirements of Fed. R. Crim P. 15. Id. at 3; Government Response to Motion to Dismiss, United States v. Harris, filed November 23, 1992, at 2.

[1086] Government Response to Motion to Dismiss, United States v. Harris, filed November 23, 1992, at 2.

[1087] Order, Report and Recommendation, United States v. Weaver, January 6, 1993, at 2-4.

[1088] This order superseded a December 23, 1992 order that was withdrawn by the court on January 8, 1992.

[1089] Order Report and Recommendation, United States v. Harris, January 8, 1993, at 2-3.

prejudice that justified dismissal of the indictment.[1090]

On January 8, 1993, Weaver and Harris filed a joint motion in which, among other forms of relief, they sought to dismiss the indictment. In this pleading, they repeated their allegation that the U.S. Attorney's Office had subverted the preliminary hearing process by securing a grand jury indictment when it had become apparent that probable cause could not be found at the preliminary hearing. In addition, they argued that this alleged subversion was exacerbated in the case of Harris since the U.S. Attorney had stated to the court that an indictment would not be sought until the completion of the preliminary hearing.[1091]

District Court Judge Edward Lodge rejected this defense challenge and adopted the recommended report and order of Magistrate Judges Williams and Boyle in orders issued on February 17, 1993. Judge Lodge repeated his rejection of the motion to dismiss in his order addressing the motion to disqualify the U.S. Attorneys Office from prosecuting the case.

3. Discussion

We agree with the judicial determinations in the Weaver and Harris prosecutions that the return of an indictment in the midst of a preliminary hearing extinguishes the right to a preliminary hearing. The sole purpose of the preliminary hearing is to determine whether probable cause exists to believe that the defendant has committed the criminal conduct described in the complaint. Once the grand jury has made an independent determination that probable cause exists and returns an indictment, that document becomes the charging document in the prosecution. There is no reason for the preliminary hearing to continue. Nor are we aware of any estoppel principle that would restrict the government from returning an indictment while a preliminary hearing is in progress.

[1090] Id. at 1-2.

[1091] See Motion to Disqualify the United States Attorney's Office, To Dismiss the Indictment, To Strike Prejudicial Allegations, To Order an Evidentiary Hearing and For a Continuance Pending an Investigation by the United States Attorney General and Pending Interlocutory Appeals by the Parties, United States v. Weaver, filed January 8, 1993, at 2-3. In addition, Weaver and Harris filed separate pleadings on January 19, 1993 and January 25, 1993 respectively in which they objected to the report and recommendation filed by Magistrate Judges Boyle and Williams.

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concern is directed at two other areas. First, whether the statements that Ellsworth made constituted a guarantee that Harris would have a "full" or "complete" preliminary hearing in return for agreeing to a continuance and, if such a representation was made, did Ellsworth make it with the intent to promise a complete preliminary hearing.[1092] Second, whether Howen or Lindquist understood that Ellsworth had made such a representation before the indictment was presented to the grand jury.

Focusing on the first issue, an examination of the September 11 transcript reveals clearly that defense counsel Nevin was concerned that if the preliminary hearing were continued, the prosecution might obtain an indictment and terminate the hearing. Thereafter, there was an exchange among Nevin, Ellsworth and the court in which the agreement of the parties was formed. Ellsworth insisted that he had no ulterior motive for the request and stated that "I am willing to give assurances that we intend to have a preliminary hearing . . . ."[1093] Nevin said that he would have no objection to the continuance "if what counsel is saying is that there is going to be a preliminary hearing on Tuesday no matter what. . . ."[1094] Ellsworth responded that "[t]he government has no problem with that stipulation." The court then proceeded to ensure that the parties understood the terms of the agreement. Nevin agreed that he was agreeing to

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[1092] Standard 3-2.9(d) of the American Bar Association Standards for Criminal Justice provides that, "[a] prosecutor should not intentionally misrepresent facts or otherwise mislead the court in order to obtain a continuance." Nor should a prosecutor "seek a continuance solely for the purpose of mooting the preliminary hearing by securing an indictment." Standard 3.3.10(d), ABA Standards for Criminal Justice (1992). Although the Department of Justice has not adopted the ABA Standards as official policy of the Department, it recommends all U.S. Attorneys to familiarize themselves with the standards since the courts use the standards when addressing matters presented to them. United States Attorneys' Manual, § 9-2.102.

[1093] Transcript of Motion Hearing, United States v. Harris, No. MS-3924, September 11, 1993, at 6-7.

[1094] Id. at 7.

continue the preliminary hearing on the representation that Ellsworth was making the motion simply to honor the requests of the chief of police, that Ellsworth was not making the request to

permit his office time to present an indictment to the grand jury and that Ellsworth was providing a guarantee that Harris would have a preliminary hearing on September 15. Nevin agreed that the agreement did not include a promise that the USAO would not subsequently impanel a grand jury and return an indictment. In response, Ellsworth told the court that he had "no problem" with the terms of the agreement.[1095]

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]wnen first confronted with the statements that Ellsworth made, Howen stated to the court, "[w]e think, in good faith, the United States Attorney, with the -- with the transcript I have here, did guarantee a preliminary hearing."[1096] The remarks of the court echoed this view.[1097] In its initial ruling on this issue, the Court

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[1095] Id. at 7-9.

[1096] Harris Preliminary Hearing, September 16, 1992, at 37.

[1097] For example, at the proceedings on September 15th, after Lindquist informed the court of his scheduling problems, defense counsel Nevin reiterated his concern about the grand jury returning an indictment. When Lindquist asserted that he could not assure Nevin that Harris would have a complete preliminary hearing uninterrupted by an indictment, the court inquired whether Lindquist had "visited with Mr. Ellsworth about the nature of the hearing held last week on this very question." Later the court stated that it was going to review the tape of the hearing that evening because he thought that "there was some representation that there would be a complete preliminary hearing held in this matter." Id. 228-233.

concluded that the stipulation "contemplat[ed] that Mr. Harris would be entitled to a preliminary examination."[1098]

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] we cannot conclude that Ellsworth intended to guarantee Harris a full preliminary hearing.

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[1098] Id., September 17, 1992, at 4.[

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5 U.S.C. 552(b)(3), Rule 6(e)
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

4. Conclusion

We do not believe that Mr. Ellsworth intentionally misrepresented the position of the government yet we do conclude that he gave insufficient consideration to the information available to him and to the plain meaning of his statements. Finally, the evidence does not sustain the charge that before the indictment was presented to the grand jury that Howen and Lindquist believed that Ellsworth had guaranteed a complete preliminary hearing to Harris. We find no misconduct by them in this matter.

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L. Scope of the Indictment and Alleged Prosecutorial Misconduct Before the Grand Jury

1. Introduction

Following Weaver's surrender, the prosecution presented a series of charges against him and Harris to a grand jury on September 15, 1992. An indictment was returned on September 16, charging the defendants with the murder of Deputy Marshal Degan and with an assault on Degan and Deputy Marshals Roderick and Cooper.[1103]

Between September 16 and October 1, 27 witnesses appeared before the grand jury, which returned a superseding indictment on October 1 that included a broad charge of conspiracy by Weaver and Harris.[1104] On November 18 and 19, nine more witnesses testified before the grand jury, which returned a second superseding indictment on November 19, setting forth essentially the same charges contained in the October 1 indictment.[1105]

On January 8, 1993, counsel for Weaver and Harris filed pretrial motions to dismiss the superseding indictment, in part, because of alleged prosecutorial misconduct that occurred during the grand jury proceedings between September 16 and October 1. b6 b7C The defense claimed that [ ] made improper statements to the grand jury, which were the b6 b7C equivalent of unsworn testimony, and that [ ] had elicited irrelevant and protracted testimony regarding the violent criminal activities of white supremacist groups known as the Aryan Nations, Order 1 and Order 2. Defense counsel asserted that this evidence was introduced to inflame the grand jury and prejudice it against Weaver and Harris.[1106]

Weaver's counsel also alleged at trial [ ] b5 that the conspiracy charged in Count 1 of both superseding indictments was overly broad in that it covered a period beginning in January 1983 and continuing through

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[1103] See 18 U.S.C. §§ 2, 111, 115, 1111, and 1114.

b6 b7C [1104] The witnesses were presented by [ ]

[1105] See Indictments in United States v. Randall C. Weaver and Kevin L. Harris, dated September 16, October 1, and November 19, 1992.

[1106] See Memorandum in Support of Defendants' Motions, January 8, 1993, at 21-26 (hereinafter cited as "Defendants' Memorandum").

August 31, 1992.[

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In addition to these allegations, we have also considered whether the prosecution improperly limited the scope of the grand jury's investigation to crimes committed by Weaver and Harris and precluded a broader inquiry into possible crimes committed by law enforcement officers in the shooting of Vicki Weaver.[1107] Finally we have examined the propriety of the decision of the government to seek the death penalty in the Weaver case.

2. Statement of Facts

a. Scope of the Indictment: The Conspiracy Count

Count 1 of both superseding indictments alleged the existence of a wide-ranging conspiracy among "Randall C. Weaver, Vicki Weaver, Kevin L. Harris and others known and unknown to the Grand Jury, including some other members of the Weaver family," beginning from the time Weaver moved his family from Iowa to Idaho in 1983 and continuing through Weaver's surrender to authorities on August 31, 1992. The prosecution's theory was that the Weavers and Harris had long planned a violent confrontation with law enforcement, a plan that came to fruition on August, 21, 1992, when Harris killed Deputy Marshal Degan.[1108]

Weaver's counsel accused the prosecution of "engaging in the 'demonization'" of Randy Weaver by adding the conspiracy count to the original indictment. Defense counsel alleged that the conspiracy count was used to justify the introduction of inflammatory and prejudicial evidence at trial.[1109]

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[1108] See Response to Motions to Disqualify United States Attorney's Office, January 25, 1993, at 14-16.

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, in a 1983 newspaper interview, Weaver had discussed plans to move from Iowa to Northern Idaho to live in an isolated hideaway and "survive the coming 'great tribulation.'" The article stated that Weaver was "developing defense plans that include[d] a 300 yard 'kill zone' encircling [his] compound."[1113]

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[1109](...continued)
trial, Weaver and Harris were acquitted of the conspiracy count. Harris was acquitted on all the other counts that went to the jury. Weaver was convicted only on Count 3, failure to appear for trial on the original firearms violation , and Count 9, committing an offense while on pretrial release.

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[1113] "Survivalist Makes Plans for Time of 'Great Tribulation,'" Waterloo Courier, January 9, 1983, at B1; Objection to Report and Recommendation and/or Motion for Reconsideration, January 8, 1993, at 2-3.

[1114] The initial indictment only charged Harris and Weaver with the murder of Deputy Marshal Degan and with the assault on Degan and two other deputy marshals.

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1118] The objects of the conspiracy were set forth in the indictment:

> 1. To forcibly resist, oppose, impede, interfere with, intimidate, assault and/or otherwise cause a violent confrontation with law enforcement authorities in the engagement in or on account of the performance of their official duties of

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] Rule 404(b) of the Federal Rules of Evidence, which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

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enforcing the laws of the United States . . . as to said Randall C. Weaver, Vicki Weaver, Kevin L. Harris and others;

2. To purchase, develop and maintain a remote mountain residence/stronghold;

3. To illegally and otherwise make, possess, sell and/or conceal firearms and ammunition;

4. To fail to appear for trial on pending federal criminal charges after orally and in writing agreeing to appear for trial before a federal judge;

5. To hinder or prevent the discovery, apprehension, arrest and trial of federal fugitives from justice;

6. To steal, conceal, retain and/or convert the personal property of others to their own use;

7. To intimidate neighbors, as well as law enforcement officers and agents, by the use, display, threat to use and/or discharge of firearms;

8. To use, display, threaten to use, fire and/or discharge firearms at or near human beings, vehicles and/or aircraft; and

9. To assault, shoot, wound, kill and/or murder, or threaten to cause such to occur . . . by means of the use of deadly weapons. . . .[1119]

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[1119] See Second Superseding Indictment, United States v. Randall C. Weaver and Kevin L. Harris, CR92-080-N-EJL, dated November 19, 1992.

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5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

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b. Evidential Support for Certain Overt Acts and Substantive Offenses

b5 Defense counsel [ ] in pretrial motions [ ] claimed that "a great majority" of the overt acts alleged in the indictment as part of the conspiracy count were without evidentiary support and should not have been charged.[1126] The defense also complained that many of the overt acts were not, in themselves, criminal or had no relation to the object of the conspiracy.

The defense asserted in pretrial motions that Count 1 of the indictment, which charged a wide ranging conspiracy, forced them to defend against "alleged crimes that are irrelevant to the

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case."[1127] The overt acts challenged included those set forth in the following paragraphs of the second indictment:

> 7. On or about May 6, 1985, Randall C. Weaver and Vicki Weaver mailed a letter addressed to the President of the United States and the . . . United States Secret Service; . . . .
>
> 32. On or about April 18, 1992, Randall C. Weaver, Vicki Weaver, or Kevin L. Harris shot at or near a helicopter and its occupants; . . . .
>
> 36. On or about May 2, 1992, Randall C. Weaver and Kevin L. Harris stole a video camera and other equipment, later destroying it or converting it to their own use; . . . .
>
> 38. On or about August 3, 1992, Randall C. Weaver, Vicki Weaver, Kevin L. Harris and/or some other members of the Weaver family stole a water tank and pipe belonging to another;
>
> 39. On or about August 17, 1992, Kevin L. Harris and/or some other members of the Weaver family attempted to enter a residence occupied by another and took or attempted to take the personal property of others; . . . .
>
> 41. On or about August 22, 1992, Randall C. Weaver or Kevin L. Harris and an

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[1127] Weaver's counsel initially raised this issue in a Motion to Strike Surplusage contained in the Superseding Indictment and argued that certain overt acts did not allege federal offenses and should be stricken. Memorandum in Support of Motion to Strike Surplusage November 13, 1992, at 8-9. That motion was referred to U.S. Magistrate Judge Larry M. Boyle, who agreed that certain language should be stricken from the indictment as surplusage but denied the request that overt acts, which constituted nonfederal crimes, be stricken. Order, Report and Recommendation, January 8, 1993, at 9 (hereinafter cited as "Boyle Order"). Counsel renewed this argument in a Motion to Disqualify the U.S. Attorney's Office, filed with the trial court on January 8, 1993. This Motion addressed the Second Superseding Indictment. Judge Lodge found Judge Boyle's ruling on the issue dispositive and denied the motion. Order, February 26, 1993, at 16 (hereinafter cited as "Lodge Order").

> unidentified female, probably Vicki or Sara Weaver, took offensive action against a helicopter and its occupants, including attempting to shoot at the helicopter, resulting in the death of Vicki Weaver and the wounding of Kevin L. Harris and Randall C. Weaver. . . .[1128]

The defense also claimed that there was no evidence to support the allegation that Randy Weaver shot Deputy Marshal Degan on August 21, 1992 and fired at the other marshals.[1129] The trial court adopted the finding of Magistrate Judge Boyle, who ruled that the overt acts complained of were relevant to the defendants' role in the conspiracy and that statements, acts, and threats of violence against others bore upon issues such as premeditation and malice.[1130]

The court dismissed Counts 6 and 8 on the defendants' motion at the conclusion of the prosecution's case-in-chief. Count 6, which charged Weaver and Harris with assaulting federal officers in a helicopter on August 22, 1992, was dismissed because the court found no evidence that the officers knew of the assault. The court considered this knowledge to be an element of the offense. Count 8, which charged the receipt and possession of firearms by a fugitive, was dismissed because the court found no proof that Randy Weaver had travelled across state lines, as is required by the statute under which the crime had been charged.

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c. Alleged Unsworn Testimony Given by [ ] Before the Grand Jury

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Defense counsel asserted in pretrial motions that [ ] made [ ] a witness by offering unsworn testimony on a number of matters to the grand jury.

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[1128] Second Superseding Indictment, United States v. Randall C. Weaver and Kevin L. Harris, returned November 19, 1992.

[1129] See Defendants' Memorandum, January 6, 1993, ¶ 18.

[1130] See Boyle Order, at 9; Lodge Order, at 16. See also United States v. Ayers, 924 F 2d 1468, 1484 (9th Cir. 1991)(allegations and/or overt acts of a conspiracy do not have to allege federal crimes or be unlawful).

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b7C [The defense also charged that [ ] had "testified as an expert as to how Vicki was shot."[1135] [

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[1135] Defendants' Memorandum, January 6, 1993, ¶ 54.

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In its response to the defense motion, the Government asserted that "[t]he statements cited [by the defense], when reviewed in the context of the witnesses testimony and/or grand jury inquiry, are not 'unsworn testimony.'"[1139]

In a pretrial order, Judge Edward J. Lodge ruled that the comments did not warrant dismissal of the superseding indictment. The court held that there was no misconduct that "'substantially influenced the grand jury's decision to indict' or [raised] 'grave doubt' that the decision to indict was freed from the substantial influence of such violations."[1140] With regard to the majority of [ ] statements, the court found that:

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> [They] were at the request of grand jurors and were not unsolicited remarks. . . . [T]he overall tenor of the statements . . . was professional and, for the most part, impartial . . . . It was repeatedly stressed that the grand jury acts independently of the prosecution, and all charging decisions were exclusively the province of the grand jury . . . . [T]he prosecution treated the grand jury with respect and with a deference to its independent function. The court believes the prosecution took steps to ensure the grand jury understood its independence.[1141]

d. Alleged Inflammatory Testimony by Prosecutor Before the Grand Jury

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The defense also alleged in a pretrial motion that [ ] intentionally sought to prejudice the grand jury against Weaver and Harris by linking them to unpopular religious beliefs and by associating them with violent criminal activities of various white supremacist groups which had previously investigated and prosecuted. In particular, the

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1139 See Response to Motions to Disqualify United States Attorney's Office, January 25, 1993, at 89.

1140 Lodge Order, at 7. See Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988), quoting, United States v. Mechanic, 475 U.S. 66, 78 (1986).

1141 Lodge Order, at 9-11.

b6 b7C defense charged that [ ] improperly elicited testimony [ ] about murders, robberies, and other crimes committed by persons associated with the Aryan Nations.[1142]

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[1142] See Memorandum in Support of Defendants' Motions, January 6, 1993, ¶¶ 55-81 (hereinafter cited as "Defendants' Memorandum").

b3 (2) b7C b6 [1143] [ ] The informant, Kenneth Fadeley, testified at trial that the proposed group would fight against the "Zionist Organized Government," or "ZOG," referring to the U.S. Government. Trial Testimony of Kenneth Fadeley, April 20, 1993, at 45, 82-90.

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[1146] The defense claimed that Howen improperly testified by stating that Weaver was not a member of the Order 1 or Order 2. Defendants' Memorandum, ¶ 54.

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1154 This refers to the "Queen of Babylon" letter, dated January 22, 1991, and sent to U.S. Attorney Maurice Ellsworth.

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The prosecution, in its response to the defense motion, asserted that the testimony of [ ] about the Aryan Nations and The Orders 1 and 2 was not unfairly prejudicial to the defendants. It argued that:

> While the prosecution has no evidence at this time that Randall Weaver was a member of any of these groups . . . [the testimony] about the various action groups, their leaders and members, the acts, crimes and wrongs they committed, and their penetration, undoing and arrest facilitated by undercover informants and cooperating codefendants, was relevant to understanding the taped statements and transcripts. With this background, the Grand Jurors could better understand the prosecution's evidence about the nature, scope and objective of the conspiracy, the leaders of the conspiracy and why Randall and Vicki Weaver formed their action group out of family members and "adopted" son, Kevin Harris, particularly after learning . . . that Randall Weaver's statements had been tape recorded by [an] undercover informant [for the BATF].[1160]

The prosecution also noted that the grand jury had been presented a series of letters written by Vicki Weaver, one of which contained a quotation attributed to "Mathews." It then explained to the grand jury who Mathews was and his significance to the Weavers:

> To those who participated in the Order investigation and prosecution, the "Matthews" [sic] is Robert Matthews [sic] and the quotation comes from one of several documents authored and signed by Robert Matthews [sic] shortly before his violent death on Whidbey Island [Washington] in December 1984 in a violent confrontation and shootout with FBI Agents attempting to arrest him. . . . Again, the testimony about the Order, its leader Robert Matthews [sic], the acts, crimes and wrongs the group committed and the manner in which he died when linked to the Weaver family's threats of violence, murder and death is relevant to explaining the content of . . . [other grand jury exhibits] and the conspiracy, its goals and objectives, the murder of William

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[1160] Response to Motions to Disqualify United States Attorney's Office, January 25, 1993, at 84-85.

> Degan and the use of firearms against suspected federal agents.[1161]

In a pretrial order denying the defense motion to dismiss the indictment, the trial court stated:

> It may be arguable the white supremacist or white separatist testimony went on for a period longer than its limited stated purpose might warrant. It is the court's understanding the testimony was intended as foundation or background to supply meaning to a tape recording and a letter written by Vicki Weaver. The intent, as stated by the prosecution in a cautionary instruction before testimony got under way on this issue and again during the middle of this testimony, was as background only.[1162] This was not lost on the grand jury, as evidenced by questions by grand jurors regarding the relevance of this testimony. The prosecution also called witnesses from within the white supremacist or white separatist groups. The testimony of witnesses involved in these organizations was that the defendants were not known members of supremacist or separatist groups. The prosecution stated this on several occasions as well, both on its own initiative and in response to the questions of grand jurors.[1163]

[1161] Id. at 86-87.

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[1162] [ ]

[1163] See Lodge Order, February 26, 1993, at 9-11. The defense motion also mentioned that some of the testimony regarding the Aryan Nations and the Orders 1 and 2 constituted impermissible hearsay. Defendants' Memorandum, January 6, 1993, ¶ 72. [

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e. Alleged Improper Prosecutorial Statements to Grand Jury Regarding Its Investigative Jurisdiction

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[1163] (...continued)

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b3 6(a) b6 b7C [[1173] [ ] did not correct [ ] representation to the grand jury.

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f. Decision to Seek the Death Penalty

Count 5 of the second superseding indictment charged Randy Weaver and Kevin Harris with the murder of Deputy U.S. Marshal William Degan while he was "engaged in or on account of the performance of his official duties."[1176] Section 1111 of Title 18, provides for a sentence of death or life imprisonment upon conviction for the murder of a federal officer.

Department of Justice policy requires the approval of the Department's Criminal Division before a U.S. Attorney may recommend application of the death penalty.[1177] [

b5] the trial court considered it a potential death-penalty case from the time the first indictment was returned charging Weaver and Harris with Degan's murder. The Court advised both defendants at their arraignments that the maximum penalty for conviction on that count was death and, as a consequence, gave them additional appointed counsel,

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[1176] See 18 U.S.C. §§ 2, 115, 1111 and 1114.

[1177] U.S. Attorney's Manual § 9-2.148 (1992).

increased the compensation given to counsel, and provided for additional investigative expenses.[1178]

On January 8, 1993, the defense filed a motion claiming that the possible penalties for Count 5 could not, under the Constitution, include the death penalty. The defense argued that the capital punishment provision of 18 U.S.C. § 1111 had been invalidated by virtue of the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) and subsequent rulings by the Ninth Circuit.[1179] The prosecution responded that the capital provision of section 1111 was still viable and that the Court could fashion standards for its application that met the requirements of Furman.[1180] The prosecution's response recognized that this position had been rejected by the Fifth Circuit and by the District of Alaska.[1181]

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[1178] See Order Respecting Potential Penalty, February 26, 1993, at 1; Memorandum [on behalf of Harris] in Support of Motion for Order Respecting Potential Sentence, January 8, 1993, at 3-4 (hereinafter cited as "Harris Death Penalty Memo"); Memorandum [on behalf of Weaver] in Support of Motion for Order Respecting Potential Sentence, January 14, 1993, at 3-4 (hereinafter cited as "Weaver Death Penalty Memo").

[1179] Harris Death Penalty Memo, at 3-4, 6. See United States v. Harper, 729 F.2d 1216, 1225 (9th Cir. 1984). Counsel for Weaver subsequently joined in the motion. Weaver Death Penalty Memo, at 3-4.

[1180] Furman requires that 1) the sanction of death be proportionate to the crime; 2) the sentencing scheme narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder, and 3) the sentencer be allowed to consider all evidence that tends to mitigate moral culpability and militate against a sentence of death. See Zant v. Stephens, 462 U.S. 862, 877 (1983); Response to Motion for Order Respecting Potential Sentence, January 25, 1993, at 2-4.

[1181] See United States v. Woolard and Bruner, 990 F.2d 819 (5th Cir. 1993); United States v. Cheely, 814 F.Supp. 1430 (D. Alaska 1992).

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Shortly thereafter, on February 26, 1993, the trial court issued an order adopting the defense's position that the death penalty provision of 18 U.S.C. § 1111 was void under Furman and Ninth Circuit precedent.[1189]

3. Discussion

a. Scope of the Indictment: The Conspiracy Count

We have found no evidence that the prosecution acted without a good faith belief that sufficient proof existed to support the conspiracy charge, notwithstanding the often harsh accusations made by the defense before and during trial.

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[1189] See Order Respecting Potential Penalty, February 26, 1993, at 2-3. See also United States v. Steel, 759 F.2d 706, 709 (9th Cir. 1985); United States v. Kennedy, 618 F.2d 557, 558 (9th Cir. 1980).

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at trial, the defense effectively attacked the theory, claiming that the Government was trying to "demonize" Weaver by charging that everything he did proved that he hated the Government.[1191]

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As for the defense claim that many of the overt acts charged in the conspiracy count were without evidential support, the magistrate denied the defense motion to dismiss the indictment after considering whether the allegations about which the defense had complained were "relevant to the charge contained in the indictment and [were] inflammatory and prejudicial."[1192]

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[1191] Closing Argument of Gerry Spence, June 15, 1993, at 10, 46.

[1192] See Boyle Order at 8; United States v. Terrigno, 838 F.2d 371, 373 (9th Cir. 1988) (motion to strike surplusage language from an indictment is within the sound discretion of the trial court).

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[1197] See U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 104; United States Attorneys' Manual § 9-11.233.

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1208 The conspiracy count also cites 18 U.S.C. § 3, which defines an accessory after the fact as someone who, "knowing that an offense against the United States has bee committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment."

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[1211] A prosecutor should not pursue criminal charges when he "knows that the charges are not supported by probable cause," or where there is "insufficient admissible evidence to support a conviction." ABA Standards for Criminal Justice: The Prosecution Function, Standard 3-3.9(a)(3d. ed. 1992).[

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D. Prosecutorial Conduct Before the Grand Jury

Although we are not bound by the court's finding that did not give improper testimony in the grand jury, we agree with its conclusion that dismissal of the indictment was not required. We find no support for a claim that misconduct occurred, which "undermined the grand jury's ability to make an informed and objective evaluation of the evidence."[1212] We look at the matter, then, to determine whether any impropriety was committed,[1213]

In discussions with grand juries, prosecutors should be careful not to testify or disclose facts not in evidence so that they do not become an unsworn witness.[1214] Prosecutors do not testify improperly when they summarize evidence presented to the grand jury;[1215] when they explain the law and the relationship of the evidence to legal theories;[1216] and when they speak about

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[1212] See United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1391-92 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984); Order, February 26, 1993, at 5.

[1213] See United States v. Birdman, 602 F.2d at 554-555.

[1214] U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 61.

[1215] United States v. Birdman, 602 F.2d at 560 (prosecutor not testifying when he reviews the evidence presented to the grand jury); United States v. Ogden, 703 F.2d 629, 637 (1st Cir. 1983) (clearly apparent from prosecutor's statement that he was summarizing FBI agent's prior testimony).

[1216] United States v. Troutman, 814 F.2d 1428, 1443 (10th Cir. 1987)(prosecutor can advise the grand jury of applicable statutes); United States v. Sears, Roebuck & Co., Inc., 719 F.2d at 1393-94(in commenting on testimony, prosecutor furnished

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"matters of formality rather than matters substantively material to the indictment" or about "insubstantial" or "arguably uncontested" issues.[1217]

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guidance to grand jury on law and weight of the evidence); United States v. DeRosa, 783 F.2d 1401, 1405 (9th Cir.), cert. denied, 477 U.S. 908 (1986)(prosecutor properly commented on agent's testimony in directing focus of jurors to correct legal issue); United States Attorneys' Manual § 9-11.020 (the "prosecutor's responsibility is to advise the grand jury on the law").

[1217] United States v. Troutman, 814 F.2d at 1443. See also ABA Model Code of Professional Responsibility, DR 5-101(B)(1) and (2).

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It is not improper for a prosecutor to express an opinion as to the merits of the case "as long as it is clear to the jury that the opinion is based only on the evidence that is before the jury and the jury itself can evaluate."[1219]

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a prosecutor should be careful not to delve into facts which are not yet a matter of record, even if they are likely to be introduced later.[1223]

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[1219] United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.), cert. denied, 459 U.S. 1038 (1982). See U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 63.

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[1223] See U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 54.

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Prosecutors are accorded wide latitude in presenting their cases to the grand jury.[1226] However, although the prosecutor "properly has wide discretion in grand jury proceedings . . . this discretion is not boundless."[1227]

The Department of Justice has set forth general standards of conduct for prosecutors before the grand jury:

> In his/her dealings with the grand jury, the prosecutor must always conduct himself/herself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape nor innocence suffer. He/she must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he/she must be scrupulously fair to all witnesses and must do nothing to

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[1226] United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring).

[1227] United States v. Al Mudarris, 695 F.2d 1182, 1184-85 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

inflame or otherwise improperly influence the grand jurors.[1228]

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[1228] United States Attorneys' Manual § 9-11.020. The American Bar Association's Criminal Justice Standards similarly provide that a prosecutor "should not make statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury." ABA Standards for Criminal Justice: The Prosecution Function, Standard 3-3.5(b)(3d ed. 1992).

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A prosecutor may present a variety of information to the grand jury without becoming a witness. "The key element is whether the prosecutor has placed his or her credibility on the line. If he or she has done so, then the prosecutor may have improperly become a witness."[1236]

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[1237] We find no grounds to conclude that were intended to inflame the grand jurors and divert it from the other evidence.[

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c. Prosecutorial Statements Regarding Investigative Jurisdiction of the Grand Jury

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The United States Attorneys' Manual provides that the prosecutor is "to advise the grand jury on the law and to present evidence for its consideration."[1238] Instructions on the law must be accurate and not deliberately misleading.[1239] Although an indictment returned "by a legally constituted and unbiased grand jury" is presumed valid,[1240] an indictment may be subject to challenge, if the prosecutor's instructions are so flagrantly

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[1236] U.S. Department of Justice, Federal Grand Jury Practice, January 1993, at 62 (citation omitted).

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[1238] United States Attorneys' Manual, § 9-11.020.

[1239] See United States v. Wright, 667 F.2d 793, 796 (9th Cir. 1982).

[1240] Costello v. United States, 350 U.S. 359, 363 (1956).

erroneous that the grand jury is deceived in some significant way.[1241]

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[1241] See United States v. Wright, 667 F.2d at 796. Compare United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976).

[1242] See United States v. Al Mudarris, 695 F.2d 1182, 1188 (9th Cir. 1983), cert. denied, 461 U.S. 932 (1983)(prosecutor's right to exercise discretion and selectivity in presenting evidence to the grand jury does not permit him to mislead the grand jury in the performance of its duties).

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d. Decision to Seek the Death Penalty

[1240] The prosecution chose to proceed based on arguments raised by the Department of Justice in an appeal then pending before the Ninth Circuit.[1247] We do not fault the prosecution for adopting the Department's legal theory and seeking a ruling from the trial court based on that theory.

There is no evidence to dispute the good faith of the prosecution in making the application to seek the death penalty.[1251] We are not convinced, though, that this case presented

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[1247] Response to Motion for Order Respecting Potential Sentence, January 25, 1993, at 2-4.

[1248] The trial court ruled that the death penalty did not apply as a matter of law and did not address the factual underpinnings of the prosecution's position.

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a good set of facts to test the viability of the death penalty in Idaho was justified.

4. Conclusion

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65]we did not find that the prosecutors charged Weaver and Harris in bad faith,[

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]Finally, the decision to seek the death penalty may be viewed as overreaching by the prosecution.

1252 See United States v. Birdman, 602 F.2d at 553 (prestige of prosecutor's office may enhance his credibility).

M. Alleged Problems with the FBI's Participation and Cooperation in the Discovery Process

1. Introduction

From the beginning of its preparation of the Weaver case for trial, it was always the intent of the U.S. Attorney's Office in Boise, Idaho ("USAO") to provide discovery to the defense in accordance with a modified open discovery policy.[1253]

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In addition, some believed that the failure of the FBI laboratory to process materials and to conduct tests in a timely fashion further impaired the ability of the USAO to respond to the discovery demands of the Weaver case.[1255] A final discovery problem surfaced during trial when the FBI produced, in response to a defense subpoena, additional documents related to the FBI shooting incident report which the USAO maintained it had requested in discovery throughout the pretrial period. It has been alleged that these problems and the delays and embarrassment that resulted were unnecessary and adversely affected the Weaver case.

[1253] This modified open discovery policy provided the defense with greater access to governmental materials and at an earlier time than required under the federal discovery rules.

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[1254] For a discussion of issues surrounding the scope of the indictment, see Section IV(L), supra.

[1255] For a complete discussion of the issues surrounding the performance of the FBI laboratory and the impact of its actions on the discovery process and pretrial preparation in the Weaver case, see discussion in Section IV(J).

2. Statement of Facts

a. Defining the Scope of Discovery

Immediately after Harris and Weaver surrendered to law enforcement authorities, the USAO began preparing the case for indictment and trial. Important components of this process included taking steps to insure that evidence was located and preserved and developing a discovery strategy.[1256] Due to the intense media interest in the Weaver case coupled with the defense allegations that law enforcement personnel had acted unlawfully and that government officials were participating in a coverup, members of the USAO decided to adopt a modified open discovery policy.[1257] Such a discovery policy was consistent with the USAO practice in handling other cases in their district.

On October 16, the USAO and defense counsel entered into an agreement captioned "Stipulation and Reciprocal Request for Discovery and Inspection, Notice of Alibi and Notice of Mental Condition" which set forth the discovery obligations of the parties. Pursuant to the terms of the stipulation, the parties were to provide the reciprocal disclosure of the materials stated in Rule 16(a)(1) and 16(b)(1) and the "reciprocal pre-trial disclosure and inspection of Jencks Act (18 U.S.C. 3500) materials, Rule 26.2, F.R. Crim. P materials and transcripts of testimony and exhibits presented to the Grand Jury."[1258] It was further agreed that "rough notes [were] generally not Jencks or Rule 26.2 materials unless they [were] a substantially verbatim recital of the trial or intended trial witness' oral statement, or seen, signed or otherwise adopted by the witness . . ."[1259] The stipulation added that "in the exchange of Jencks or Rule 26.2 materials including rough notes, the parties

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[1258] Stipulation and Reciprocal Request for Discovery and Inspection, Notice of Alibi and Notice of Mental Condition, filed October 16, 1992, at 2.

[1259] Id.

[were] authorized to redact information from those materials as permitted by case law, statute or rule, including but not limited to . . . information directly or indirectly relating to equipment, tactics and strategies of investigation, apprehension or arrest and case preparation. Such redaction [was to] be subject to in camera inspection by the Court upon written motion or objection of a party."[1260] With regard to the timing of discovery the stipulation stated that, "[i]t is the intention of the parties to accelerate the time table for discovery and inspection to a time significantly in advance of trial so that all pre-trial motions are fully and promptly made and ruled on, so that trial preparation is completed in advance of trial, so that unjustifiable delay and expense are eliminated which may result from literal application of the statutes and rules, and so that a fair, just and truthful determination of the charges pending against the defendants may be resolved consistent with the security concerns of the Court, the parties, the defendants and prospective witnesses. . . . The parties further stipulate[d] and agree[d] to file a written response to [the] stipulation on or before October 23, 1992, and on a continuing basis thereafter pursuant to Rules 12.1(c), 12.2(a) and (b) and 16(c), F.R. Crim. P."[1261]

A week after signing of the stipulation, the government provided its initial discovery response.[1262] The government continued to provide material during the pretrial period and into the trial. Indeed, the government filed multiple addenda summarizing the huge volume of materials that had been produced to the defense, including video tapes, audio tapes, investigative reports, laboratory reports and thousands of pages of documents.

Much of the material that the government produced in discovery originated from the FBI and was produced on a timely basis. However, questions have been raised as to whether actions by the FBI impeded the discovery process. In particular, allegations have been made that the FBI failed to cooperate with the USAO in meeting its discovery obligations and unjustifiably resisted producing certain documents. These actions are alleged to have impacted adversely on the prosecution of the Weaver case.

[1260] Id. at 3.

[1261] Id. at 4-5.

[1262] See Response of the United States to Stipulation and Request for Discovery and Inspection, filed October 23, 1992.

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(1) Documents at Issue

The first document at issue was the shooting incident report dated September 30, 1992. That document was a report prepared by a shooting incident review team of the Inspection Division of the FBI and represented the findings of an administrative inquiry into the August 22, 1992 shootings by the HRT at Ruby Ridge which resulted in the death of Vicki Weaver and the injuries to Kevin Harris and Randy Weaver.[1283] It consisted of: a 5-page cover memo with findings from [redacted] dated September 30, 1992; a 5-page memo from [redacted] dated September 30, 1992 summarizing the events surrounding the administrative inquiry; the statements of [redacted] some of which were signed sworn statements and others which were in the form of a FD-302[1284]; autopsy reports of the three individuals killed at Ruby Ridge; a statement of the prosecutive status of the subjects; crime scene photographs and diagrams; and news clippings.

[1281] [redacted]

[1282] [redacted]

[1283] See discussion of this administrative inquiry and the report in Section IV(G).

[1284] The FBI FD-302 is the form that FBI agents use to report or summarize the interviews that they conduct.

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On March 26, the USAO filed its Eighth Addendum to its Response to the Discovery Stipulation. In that document, the government identified additional items that were being produced in discovery including the November 9, 1992 Review Group Memo, the situation reports, the shooting incident report, the

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operations plan and annex and the marshals critique.[1324] Although identified in this filing, these documents were not produced to the defense until later.[1325] The shooting incident report was delivered by hand on April 7, 1993;[1326] the situation reports and the operations plan were delivered on April 10, 1993; and the Review Group memo and the marshals critique were delivered on April 12, 1993.[1327] The Weaver trial began the next day on April 13, 1993.

d. The Defense Subpoena Duces Tecum For the Shooting Incident Report

On April 13, 1993 the defense filed an ex parte application for subpoenas duces tecum. Among the subpoenas sought was one ordering Inspector Thomas W. Miller, who had headed the review team examining the FBI shooting at Ruby Ridge, to bring "any and all records used by the 'Shooting Incident Review Team.'"[1328] Other subpoenas requested the FBI to produce copies of certain manual provisions and certain personnel files.[1329] Judge Lodge approved the issuance of these subpoenas on April 14.

[1324] These documents were items 1431, 1432, 1433, 1434, and 1435 on the discovery list of items produced. See Government's Eighth Addendum to Response to Discovery Stipulation, filed March 26, 1993.

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[1326] Government Ninth Addendum to Response to Stipulation and Request for Discovery and Inspection, filed April 7, 1993, at 4-6.

[1327] Government Tenth Addendum To Response to Stipulation and Request for Discovery and Inspection, filed April 12, 1993, at 3, 5.

[1328] Subpoena Duces Tecum to Inspector Miller, April 13, 1993.

[1329] See section IV(O) for a discussion of the compliance of the government to these other subpoenas.

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Attached to the subpoenas was a letter dated April 12, 1993 from defense counsel Charles Peterson to "potential witness" advising the witness as follows:

> Although the subpoena requires your attendance on April 17, 1993, I expect that you will not be called to testify until the completion of the Government's case, some six weeks into the trial. Please call my office as soon as possible so that you may be advised of a specific date and time to appear -- otherwise the subpoena requires you to attend continuously from the beginning of the trial until your testimony is given. If I am unavailable, please ask for Diane or Yvonne.[1337]

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[1337] Letter from Charles F. Peterson to Potential Witness, April 12, 1993.

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on June 4, the package arrived at the USAO.

b5/b7C b6 The court had just excused HRT member Lon Horiuchi after defense questioning had been completed. the package enclosing two copies of documents responsive to the defense subpoena seeking "any and all records used by the Shooting Incident Review Team."

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b6 b7C many of the documents in the package had been provided previously to them and to the defense in discovery. However, other documents in the package had never been produced.

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drawings by HRT sniper Horiuchi including a shooting diagram of the second shot taken through the Weaver front door on August 22, 1992.[

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b6 b7C Thereafter[ ]returned to the courtroom and informed the b6 b7C parties of the package that[ ]had just received. Defense counsel referred to it as the latest in a series of incidents that had prejudiced the rights of the defendants and moved for the case to be dismissed because of alleged prosecutorial misconduct and for sanctions to be imposed on the government. b6 b7C [ ]after noting that many of the materials in the package had b6 b7C been previously produced,[1350] informed the court that[ ]office b6 was in the process of trying to determine the reasons for the b7C late production of these materials.[ ]stressed that[ ] office produced the materials as soon as they were received and suggested that the responsibility for the late production of these materials rested elsewhere. The court deferred a definitive ruling until after the weekend and then stated,

> [T]he Court is very upset about these things happening. It does appear that it is somewhat of a pattern on the part of people, agencies outside of the District of Idaho. The Court does not agree that there is any evidence that the U.S. Attorney's Office at least locally, is doing anything to hinder the prosecution of this case or prejudice the defense. The comments of Mr. Howen just now indicate his veracity and his sincerity in trying to comply with the rules . . . . It seems to be totally inexcusable and extremely poor judgment on the

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[1348] *See* discussion in Section IV(O) which discusses the problems that occurred at trial because of the untimely disclosure by the government of discoverable information.

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part of whoever is involved to send something like this fourth class mail when a trial of this nature is going on, the cost and time and human tragedy that is involved.[1351]

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[1351] Trial Transcript, June 4, 1993.

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On June 8, the parties made additional arguments to the court concerning how they should proceed after the disclosure of the subpoenaed materials. Of particular focus of the parties was the Horiuchi drawing and its significance. The court reserved its ruling until the next day but before doing so stated that:

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> The Court does not excuse the FBI Agency. The Court thinks there has been a failure to comply with what was fully understand [sic] to be required. They get involved in these technicalities as to who was served, but it is obvious they had notice of it, they were aware of what was required, and again, it is not anytime to be playing games with the Court on technicalities.[1359]

Judge Lodge issued his ruling on June 9 and ordered Horiuchi to return for further examination in court due to the failure of the government to produce the materials in a timely manner. In addition, he assessed against the government the costs and defense attorney fees for the one-day delay.[1360] Almost five months later, on October 26, Judge Lodge issued an order imposing a separate fine of $1920 against the FBI. This fine represented the fees paid to defense counsel on the day that Horiuchi was brought back to testify. In this order, which is discussed more fully in section IV(o), Judge Lodge was highly critical of the actions of the FBI which he believed hampered the ability of the government to comply with its obligations to produce discoverable documents including Jencks and Brady materials. As a result of these actions, Judge Lodge found that the FBI had failed to comply with its discovery obligations under Fed. R. Crim. P. 16 and held them to be in contempt of court in violation of 18 U.S.C. § 401.[1361]

3. Discussion

a. FBI Resistance to USAO Discovery Requests

Our investigation has revealed that the prosecution of the Weaver matter was plagued and complicated by a continuing series of disagreements, misunderstandings and preconceptions that existed between the FBI and the USAO. One of the areas where such problems surfaced involved the efforts of the USAO to respond to its discovery obligations in the case.

[1359] Trial Transcript, June 8, 1993, at 84.

[1360] Id., June 9, 1993, at 60-61.

[1361] Order in United States v. Weaver, No. CR 92-080-N-EJL, filed October 26, 1993, at 2-13 (Appendix at 46).

Although the overall effort of the FBI to respond to the discovery requests of the USAO appeared to have been good, we have found two areas where problems existed. The first involved the problems associated with the actions of the FBI Laboratory, which are discussed elsewhere in this report. The second area concerned the resistance of personnel at FBI headquarters to produce a group of documents that was small in number but significant in importance to the issues in the case.[1362]

With regard to the production of this group of documents, it is our conclusion that FBI personnel, predominantly at the headquarters level,[1363] imposed unreasonable resistance and applied inappropriate standards to the discovery requests from the USAO,[

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Based on our investigation, we conclude that headquarters personnel were informed of the scope of discovery sought by the USAO yet failed to take adequate efforts to locate responsive materials.[

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]responsibility in this case must rest on the doorstep of FBI headquarters. [

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]it was not a well organized search. [

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4. Conclusion

Although we found no intent by the FBI headquarters personnel to violate the discovery obligations of the government, we believe that the FBI unreasonably resisted the efforts of the USAO to comply with their discovery responsibilities in the Weaver case. In addition, it appears that the FBI did not put forth its best efforts in responding to the discovery requests or the subsequent defense subpoena. Indeed, the decision of the court in October 1993 to fine the FBI for its intransigence on

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various discovery issues is consistent with our conclusion.

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] There is a critical need in the future to improve the quality of the response of the FBI to discovery demands. Such improvement must include establishing an organized system of responding to and monitoring discovery requests and improving the coordination among FBI components.

N. Alleged Problems With the Participation of the FBI in Case Preparation and Its Relationship With Other Members of the Trial Preparation Team

1. Introduction

One of the issues that arose as the various law enforcement entities converged at Ruby Ridge was which agency had the primary responsibility for planning, organizing and coordinating the activities of law enforcement personnel. It was decided early in the crisis that the FBI would have the lead role in the operations at Ruby Ridge. However, after Weaver and Harris surrendered, the focus shifted from crisis resolution to trial preparation and the U.S. Attorney's Office in Boise ("USAO") assumed the lead role. Initially, the FBI believed that it was to be the sole agency assisting the USAO in trial preparation. Later, [ ] agents from the U.S. Marshals Service and the Bureau of Alcohol, Tobacco and Firearms ("BATF") were assigned by their respective agencies to assist the USAO.

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] The arrival of the marshals and the BATF agents coupled with disagreements over how witness interviews in Iowa were to be conducted worsened the [ ] working relationship between the FBI and the USAO.

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2. Statement of Facts

a. Defining the Structure of the Trial Team and the Role and Responsibilities of the Individual Members

(1) The Lead Agency Concept and the Initial Disagreement Regarding the Interviewing of Witnesses in Iowa

As the various law enforcement agencies arrived at Ruby Ridge on August 21 and August 22, 1992, it quickly became evident that there was a need for one agency to assume the leadership role during the crisis. Because the assault of a federal officer charge fell within the jurisdiction of the FBI, it was decided that it was appropriate for the FBI to perform this role. Once the crisis was over, and the focus had shifted to trial preparation, [ ] the

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[leadership role was transferred from the FBI to the USAO.[1393]

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Another issue that created controversy concerned the conducting of witness interviews[

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Under the Brady doctrine the government is required to disclose to the defense material evidence that is both favorable to the accused and material to either guilt or punishment. See United States v. Bagley, 473 U.S. 667, 676, 682 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963). This requirement is not limited to information that is in written form but extends to oral statements of which the government is aware. See generally, Carter v. Rafferty, 826 F.2d 1299 (3d Cir. 1987), cert. denied, 484 U.S. 101 (1988). In addition, the prosecutor is responsible for producing Brady information which is within the knowledge of persons working as part of the prosecution team or intimately connected with the government's case. United States v. Butler, 567 F.2d 885, 889 (9th Cir. 1978); United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975).[

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[1587] In the discovery stipulation executed by the parties, they agreed "to reciprocal disclosure and inspection of all materials stated" in Fed. R. Crim. P. 16(a)(1) and 16(b)(1). See Stipulation and Reciprocal Request for Discovery and Inspection, Notice of Alibi and Notice of Mental Condition, dated October 16, 1992, at 1. Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure provides in pertinent part that,

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports . . . of scientific tests or experiments . . . which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

[1588] See generally, 8 Moore's Federal Practice § 16 05[2] (1993).

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e. Relationship Among the Investigative Team

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The behavior of the FBI in the Weaver case revealed their troubling unwillingness to work as a team player. If the FBI could not be in control or if its views were not adopted, the FBI participated in an unreasonable manner[

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]Examples of such behavior included the intransigence that the FBI showed with regard to its opposition to the case agents conducting the interviews of the Iowa witnesses, the unwillingness of the FBI to accept and work with representatives from other investigatory agencies, the failure of the FBI to actively assist the USAO by providing expert assistance,[1592] and the resistance of the FBI to producing materials that the USAO believed were discoverable.

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[1592] See discussion of this issue in Section IV(J).

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4. Conclusion

The working relationship between the FBI and the USAO and other team members in the Weaver case was poor and, in our view, adversely impacted upon the preparation of the Weaver case for trial. Active steps must be taken to ensure that such problems do not repeat themselves in subsequent prosecutions.

O. Alleged Failure of USAO to Notify the Defense of Brady Material and Other Important Information

1. Introduction

When the Weaver trial began, the U.S. Attorney's Office in Boise ("USAO"), assisted by governmental investigative agencies, had compiled and produced a large volume of materials in discovery including thousands of pages of documents, transcripts, numerous audio and video tapes, photographs and a multitude of investigative reports. In addition, the USAO had permitted defense counsel to inspect the evidence developed during the case investigation.

Despite its efforts to comply with its discovery obligations and the Brady rule, a number of incidents occurred during the trial which cast doubt on whether the Government had been totally forthcoming in its responses to the defense. These incidents included: its resistance to produce FBI and Marshals Service manual provisions and personnel files subpoenaed by the defense; the failure to disclose all facets of the compensation arrangement between the BATF and a confidential informant; the untimely discovery of critical FBI notes relating to the interview of Deputy Marshal Cooper; the failure by [ ] to notify the defense of potentially exculpatory information learned during an interview of Idaho State Police [ ] the untimely production of crime scene photographs and disclosure of the circumstances surrounding how the photographs were taken; and the untimely production of materials associated with the FBI's shooting incident report.

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2. Statement of Facts

a. Defense Subpoenas For FBI and Marshals Service Manuals and Personnel Files

On November 3, 1992, defense counsel Charles Peterson wrote a letter to Assistant U.S. Attorney Howen identifying five classes of documents that he considered encompassed by the discovery stipulation executed by the parties. Two of these classes were "[a]ny manuals, memorandums or directives outlining the procedures and standards for developing operational rules of engagement in the field" and "[a]ny FBI arrest protocols or instructions." Peterson requested Howen to advise him if he did not intend to produce any of these materials.[1591]

[1591] Letter from Charles Peterson to Ronald Howen, November 3, 1992.

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not respond[1592] Peterson did nor did he file a motion to compel production of the materials identified in his November 3, 1992 letter.

On April 13, 1993, which was the first day of the Weaver trial, the defense filed its Third Ex Parte Application for Issuance of Subpoenas and Payment of Costs and Fees. In that document, they requested the court to issue subpoenas for numerous individuals and documents including:

> 4. Federal Bureau of Investigation, (1) for the production of any and all FBI manuals which describe procedures or establish standards and rules for the apprehension of fugitives, arrest of subjects or the use of force. By this request the defendants intend to reach the publications used by members of the FBI which describe what the government's witnesses have testified to as the 'standard rules of engagement' for that agency, and any other policy or procedures used by the agency and its Hostage Rescue Team for the apprehension of fugitives, arrest of subjects or the use of force; and (2) the personnel files in its control for Special Agent Lon Horiuchi, or Deputy United States Marshals William Degan, Arthur Roderick, and Larry Cooper.

The defense also requested similar manuals from the U.S. Marshals Service as well as any personnel files of Horiuchi, Degan, Roderick and Cooper that were in their control.[1593] On April

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[1593] See Third Ex Parte Application for Issuance of Subpoenas and Payment of Costs and Fees, filed April 13, 1993 with signed Order, dated April 14, 1993. The defense also requested a

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14, Judge Lodge issued the subpoenas requested in the ex parte order. However, he modified the order drafted by the defense by adding the following sentence, "[p]ersonnel records to be viewed only by defense counsel and not to be turned over to third parties or the media."[1594]

By oral motion on April 15, defense counsel Peterson sought to compel the production of the personnel files and the manual provisions that the court had ordered the previous day. In particular, Peterson was seeking the personnel file of Deputy Marshal Cooper and the Marshals Service manual provisions to assist in his cross examination of Cooper.[1595] Peterson characterized the issue as a government failure to comply with discovery and argued that production of these materials was required by the recently issued subpoenas.

Howen responded that he could not be expected to respond to the subpoena when he had not been served with it nor had the documents in his possession. In addition, Howen told the court that he would expect counsel at the FBI and the Marshals Service to handle the responses to the subpoenas. However, he argued that he was aware of no court that would allow defense counsel to have direct access to personnel files of witnesses.[1596] Assistant U.S. Attorney Lindquist informed the court that the FBI case agent had told him that they had received the subpoena and that FBI Headquarters had been contacted. With respect to the Marshals Service subpoena, Lindquist stated that he had no knowledge but would take steps to ensure that the Marshals Service responded to it.[1597]

The court acknowledged that the subpoena for the personnel files raised privacy issues and that further restrictions might be necessary but encouraged the government to facilitate the response to the subpoenas even if the documents were not within

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[1593](...continued)
subpoena duces tecum be issued for all records used by the shooting incident review team. A discussion of this subpoena and the controversial response to it is contained in Section IV(M).

[1594] Id.

[1595] Trial Transcript, April 15, 1993, at 142.

[1596] Id. at 144-48.

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[1597] Trial Transcript, April 15, 1993, at 148-49.

their control.[1598] Thereafter, defense counsel Spence agreed to inform the government of the specific requests.[1599]

The Marshals Service provided the applicable Marshals Service manual provisions to the USAO on April 16. [

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On April 23, the defense moved to hold the government in contempt or to compel it to produce the requested manuals and personnel files. As of that date, the government had filed nothing in response to the subpoena.[1601] In court, defense counsel Nevin stated that he had been advised that the subpoenas had been served and that Howen had told him that he had the Marshals Service materials but did not want to produce them.[1602] Howen responded that he viewed this issue as a discovery dispute[1603] and that he was in the process of drafting a motion for a protective order. He disputed that the subpoenas seeking the personnel files had been served although he acknowledged that he learned that day that the subpoenas for the manuals had been served. Howen then referenced the November 1992 communications with defense counsel Peterson regarding the manuals and argued that Peterson should have sought to compel compliance earlier.[1604] Nevin responded that the motion to compel was directed to the recently issued subpoenas not prior discovery requests.[1605] Thereafter, Lindquist announced that he had the

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[1598] Id. at 152-54.

[1599] Id. at 154-55.

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[1601] Memorandum in Support of Motion for Finding of Contempt, or in the Alternative for an Order to Show Cause and to Compel, filed April 23, 1993.

[1602] Trial Transcript, April 23, 1993, at 153-54.

[1603] Howen did not think that the November 1992 letter from Peterson requested discoverable material nor did he understand how the request related to the issues of the case. Thus, after receiving the letter he made no attempts to secure the requested material from the FBI.[ ]

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[1604] Trial Transcript, April 23, 1993, at 157-59, 160-62.

[1605] Id. at 166.

requested Marshals Service personnel files but could not relinquish them without Marshals Service approval.[1606]

Judge Lodge responded that he wanted to assure himself that the subpoenas had been served and then wanted the government to respond either by complying or by filing a response. Judge Lodge stated that it did not matter to him if the response was filed by counsel for the Marshals Service or the FBI, but he expected the Assistant U.S. Attorneys, as officers of the court, to assist "in moving those matters along." If the response to the subpoena was not immediate, Judge Lodge said "this trial will come to a halt." Moreover, if the government had authority that the defense has no right to the personnel files he wanted it to inform the court of the authority. The court also rejected the government's argument that this was a discovery issue and expressed frustration over the ambiguity of the USAO as to whether it represented the FBI and Marshals Service on this issue.[1607] Judge Lodge then ordered the manuals produced "forthwith" but reserved judgment on the personnel files and requested assistance from counsel on the issue "because the Court was concerned with it at the time the Court issued it."[1608]

Later that day, Lindquist informed the court that the FBI had still not received a subpoena for the Horiuchi personnel file but that it was working on its response and that the USAO was drafting a response concerning whether the personnel files could be produced. With regard to the Marshals Service manual, it was agreed the defense would have access to it but that the government would identify sensitive portions and then the court would rule as to whether they could be used at trial.[1609] Howen then told the court that he would be representing the government on this issue and apologized if he had misled the court on this issue.[1610]

On April 23, the USAO moved for a protective order objecting to the subpoenas seeking the personnel files and the manuals. In that motion, the USAO repeated many of the previous arguments it had raised. In addition, it argued that it was outside the

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[1606] Id. at 169-70.

[1607] Id. at 172-74. [

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[1608] Trial Transcript, April 23, 1993, at 172-74.

[1609] Id. at 234-35, 240-41.

[1610] Id. at 244-45.

supervisory power of the court to order the production of the personnel files, that the appropriate procedure was to have a law enforcement officer familiar with the issues to conduct a "Henthorn" review[1611] and that the government had ordered those reviews to be done. It also advised the court that the subpoenas had not been served on either agency and that the USAO had the Marshals Service personnel files but not the FBI file. In addition, the government had requested the FBI and the Marshals Service to review the manuals for sensitive information and, if located, the government would request in camera review.[1612]

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[1611] This review has its origins in the case of United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), cert. denied, 112 S.Ct. 1588 (1992). In that case, the Ninth Circuit reaffirmed its holding in United States v. Cadet, 727 F.2d 1453, 1467 (1984) that once the defendant has made a discovery request for the personnel files of law enforcement witnesses, the government has the "duty" to review these personnel files to determine if they contain material information that is favorable to the defendant. If the prosecutor is uncertain whether any information is material, he can submit the matter to the court for in camera review. The personnel files do not need to be produced "to the defendant or the court unless they contain information that is or may be material to the defendant's case." United States v. Henthorn, 931 F.2d at 31; accord, United States v. Dominguez-Villa, 954 F.2d 562, 565 (9th Cir. 1992); United States v. Cadet, 727 F.2d at 1468. The review of the personnel files need not be done by the federal prosecutor responsible for the case. It is sufficient if an appropriate agency attorney or a member of his staff conduct the review and then notify the prosecutor of the results of the review. The prosecutor is then responsible for determining if the information is potentially Brady material and if so whether it should be produced or submitted to the court for in camera review. See United States v. Jennings, 960 F.2d 1488, 1492, n.3 (9th Cir. 1992).

[1612] Government Motion for Protective Order, For In Camera Inspection and Motion to Seal, filed April 23, 1993, at 3-6.

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5 U.S.C. 552(b)(6)
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The defense objected to the government's motion for a protective order on April 30, 1993. At that time, the defense stated that it had received the Marshals Service training manuals and that the USAO had the Marshals Service manuals and the Marshals Service personnel files. With regard to the FBI materials, the defense said that the FBI had produced the training manuals but not the personnel manual to the USAO. The defense argued that pursuant to the terms of the discovery stipulation the government was obligated to produce exculpatory material and thus they should have reviewed and produced any such information contained in the personnel files without the need for an additional request. The defense admitted that their request for the complete personnel files may have been too broad but believed that the court's modifications to its order adequately addressed the privacy concerns.[1620]

On May 10, the government filed its Thirteenth Addendum to its Response to the Discovery Stipulation in which it included the Henthorn certifications for Horiuchi, Roderick, Cooper and Degan.[1621] Defense counsel Peterson raised the personnel file

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[1617](...continued)

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[1620] Defendants' Response to Motion for Protective Order, For in Camera Inspection and Motion to Seal, filed April 30, 1993.

[1621] The Marshals Service provided the Henthorn certifications for Roderick, Cooper and Degan on May 4, 1993.

issue again in court that day and repeated his argument that the defendants were entitled to access to the personnel files. Lindquist indicated that neither the FBI nor the Marshals Service had received a subpoena for the personnel files[1622] and that he and Howen had made it clear to defense counsel that the personnel files and manuals could only be obtained by subpoena.[1623] The court opined that the procedure set forth in the Henthorn case was controlling and the complete personnel file did not need to be produced unless such production was necessary to satisfy the Government's disclosure obligations.[1624]

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On May 17, the court ruled on the personnel file issue. It noted at the outset that even though the personnel files were not specifically addressed in the discovery stipulation, the federal prosecutor, under Ninth Circuit law, has the obligation by virtue of his oath of office to produce Brady material without a court order. Furthermore, the court held that "[c]ounsel for the government should have undertaken this search in advance of trial, on their own initiative." It approved the procedure proposed by the government which was to have the law enforcement agent knowledgeable about the issues in the case to review the files for Brady material. If Brady material did not exist, the defense was to be informed; if Brady material was located it was to be presented to the defense; and if the material was questionable, the court was to conduct an in camera review and make a determination as to whether it should be produced. The court ordered that this review should be done no later than two days before the witness is to testify and with regard to those

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[1622] Trial Transcript, May 10, 1993, at 8.

[1623] Id. at 10.

[1624] Id. at 152.

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witnesses who have already testified, the review should be conducted "post haste."[1627] Later that day, defense counsel Spence stated that the only personnel file that they needed was the file of Lon Horiuchi.[1628]

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b. Financial Compensation of Informant Fadeley

It was the gun sale between Weaver and a government informant that provided the basis for the initial criminal charges brought against him. The Government also planned to introduce statements that Weaver had made to the informant during four taped conversations as evidentiary support for its conspiracy theory. After informal attempts to learn the identity

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[1627] Order, filed May 17, 1993, at 1-4.

[1628] On May 21, 1993, the government produced the Henthorn certifications for Deputy Marshals Hunt, Norris and Thomas. Government Fourteenth Addendum to Response to Discovery Stipulation, filed May 21, 1993.

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of the informant had failed,[1634] Weaver's attorneys requested this information in a pretrial motion as well as any evidence that would affect the bias or credibility of the informant including "any promises of consideration given to the informant."[1635] On March 28, 1993, the government responded to this motion and refused to provide the requested information citing the untimeliness of the motion and the risks that disclosure posed on the informant.[1636] Thereafter, on April 12th, the court ordered the government to provide the requested information.

On April 13, the first day of trial, the Government identified the informant as Kenneth Fadeley. With respect to any compensation paid to Fadeley, the government stated, "Mr. Fadley [sic] has received reimbursement for expenses in the approximate amount of $500.00, but no salary."[1637] [

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[1638]]

Kenneth Fadeley began testifying on April 19 and continued into April 20 at which time defense counsel began cross examining him. Toward the end of the cross examination, defense counsel inquired about the compensation that Fadeley had received for his work on the Weaver matter. Fadeley testified that when he works for BATF he is paid for expenses which would include such items as gas and food. He could not recall how much money BATF paid him for expenses in 1986 but agreed that it was greater that $1.00 but less than $10,000.[1639] From 1987-1989, BATF paid Fadeley for "just" expenses but he was unable to recall the

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[1634] See Affidavit of Charles F. Peterson in United States v. Weaver, No. CR 92-080-EJL, dated March 17, 1993.

[1635] See Weaver Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility, in United States v. Weaver, filed March 17, 1993.

[1636] Government Response to Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility, in United States v. Weaver, filed March 26, 1993.

[1637] Addendum to Response to Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility and Order to Seal (sealed), in United States v. Weaver, April 13, 1993, at 2.

[1638] [ ]

[1639] Trial Testimony of Kenneth Fadeley, April 20, 1993, at 152-54.

amount paid.[1640] Later, after Fadeley agreed that he had not assisted the government in this case for money and that BATF had never paid him any type of salary other than the payment of expenses, the following exchange occurred:

> Q . . . .When you first started working for ATF, were you told that you would be paid on a case-by-case basis?
>
> A I was told I'd be paid expenses for my work.
>
> Q Expenses. Were you told that you'd get paid after a case was made against a person?
>
> A After we concluded a case, there may be a monetary settlement, possibly.
>
> Q Okay. "After we concluded a case, there may be a monetary settlement"? Oh, let's talk about this case then. First of all, in order to conclude a case, you would have to get a guy to trial in the case, is that right?
>
> A I would assume so.
>
> Q And you would assume that not only would you have to get him convicted, right?
>
> A If he was guilty.
>
> Q Well, if you don't get a conviction, you don't get any money; isn't that right?
>
> A I would assume so.
>
> Q And that's not just your assumption, sir, that's your understanding about this case too, isn't it? If Randy Weaver gets acquitted of this gun case, you don't get paid; right?
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> A I guess so.[1641]

Following this exchange, Fadeley testified that he did not know how much money he would be paid if Weaver were convicted and

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[1640] Id. at 154-55.

[1641] Id. at 160-61.

insisted that the amount of any future award had no impact on his testimony.[1642]

On April 20, defense counsel Spence moved in open court to strike the testimony of Fadeley and to dismiss all counts of the indictment based upon the Fadeley testimony. Spence argued that Fadeley was a contingent fee witness and that it was unlawful to permit such testimony to be used at trial.[1643] Howen denied that Fadeley was a contingent fee witness and argued that Fadeley's testimony regarding any future compensation that he might receive was partially based on his confusion regarding money.Fadeley might receive in the future under the witness protection program to compensate for "any differential or loss to him in either his job, his home, or other items."[1644] Howen then represented that BATF Agent Byerly, who communicated with Fadeley regarding financial compensation, would testify that Fadeley was paid for expenses and then was told that he "could be held for an award at a later time."[1645] Howen maintained that such an arrangement did not constitute a contingent fee agreement. Thereafter, the court took the matter under advisement but declined to declare a mistrial.[1646]

The government recalled Byerly to address the Fadeley compensation issue. Byerly testified that Fadeley was neither an agent nor a salaried employee of BATF. He explained that he had made an agreement with Fadeley whereby Fadeley would be reimbursed for his necessary investigative expenses associated with attending the Aryan Nations summer conferences in 1986, 1987 and 1989 and that for the entire period that Fadeley was assisting BATF he was paid expenses of $445. In addition, Byerly testified that he had informed Fadeley that he could receive an award after a case was completed. Byerly stated, "I explained to Mr. Fadeley that at the end of the case, whatever it might be, at the end of the judicial proceedings that I would submit his name to my supervisors for an award."[1647] According to Byerly, his recommendation would be reviewed by several layers of supervisors who could approve, increase or reduce the award. Byerly insisted

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[1642] Id. at 161-63, 179.

[1643] Trial Transcript, April 20, 1993, at 6-10.

[1644] Id. at 11-13.[

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[1645] Trial Transcript, April 20, 1993, at 12-13.

[1646] Id. at 14-15.

[1647] Trial Testimony of Herbert Byerly, April 20, 1993, at 68-70.

that the award was not influenced by the outcome of a case and that he had never informed Fadeley otherwise.[1648] Indeed, Byerly testified there were instances where informants received awards for work on cases that were never prosecuted.[1649]

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[.[1650]] He said that he anticipated that he was going to recommend that Fadeley receive an award of $3,500 for his work on the Weaver case. Byerly insisted that Fadeley was mistaken if he believed that the award was contingent upon there being a conviction in the case.[1651]

On April 21, defense counsel filed a motion to strike the Fadeley testimony arguing that it was improper because Fadeley had been promised a contingent fee if Weaver were convicted. In addition, they complained that the prosecutors had an obligation to disclose this arrangement to the defense prior to trial but had failed to do so. Moreover, they argued that the government's denial that Fadeley had been paid any fee constituted misconduct.[1652] In its response, the government denied that a contingent fee arrangement existed between BATF and Fadeley and then repeated its argument that Fadeley's responses were affected by his confusion over financial benefits he might receive under

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[1648] Id. at 70-72.

[1649] Id. at 75.

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[1651] Byerly Trial Testimony, April 20, 1993, at 76-79.

[1652] See Weaver Motion to Strike Testimony of Kenneth Fadley [sic] and Memorandum in support thereof, in United States v. Weaver, filed April 21, 1993.

the witness protection program. Howen also denied having prior knowledge of the possible monetary award from BATF.[1653]

Judge Lodge ruled on the motion to strike on May 17 and found that although "Fadeley believed that he was involved in a contingency fee arrangement," the testimony of agent Byerly indicated that the government did not intend for a contingency fee arrangement to exist.[1654] Consequently, the circumstances did not exist to warrant the striking of the Fadeley testimony. However, Judge Lodge ruled that a cautionary instruction regarding how to evaluate the credibility of Fadeley would be appropriate.[1655] On May 19th, the Government informed the defense of the amounts that Fadeley had received for expenses, and awards and the amount of the proposed cash award.[1656]

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[1653] See Government Response to Motion to Strike Testimony of Kenneth Fadeley.

[1654] Order in United States v. Weaver, dated May 17, 1993, at 7-8.

[1655] Id. at 8.

[1656] Government Second Addendum to Response to Motion to Compel Identity of Informant, Criminal Record, and Matters Affecting Bias or Credibility, and Order to Seal, filed May 19, 1993.

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c. Late Production of the Calley Notes

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afternoon of August 22, FBI Special Agents [ ]on the]and George Calley interviewed Cooper at the courthouse at Bonners Ferry, Idaho. According to Calley,[ ]Calley was responsible for taking notes.[

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As one of the three marshals involved in the August 21 shootings at Ruby Ridge, the testimony of Cooper was critical to both the prosecution and the defense. The FD-302 of Cooper and the handwritten notes of that interview became very controversial documents in the Weaver case[

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consistently maintained that, after Harris had fired the shots that hit Degan, he fired a three-round burst at Harris who fell to the ground "like a sack of potatoes." Cooper then directed his weapon on Sammy but did not shoot him because he could not see if Sammy was carrying a gun and because Sammy had not fired at Degan. Later, Cooper fired a second three-round burst at no particular target but in the direction from which he had last received fire. After he took these shots, Cooper saw Sammy running out of view and up the trail leading to the cabin.[1668]

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Calley prepared two final FD-302s of the Cooper interview:

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,]Calley began taking notes of the Cooper interview on a yellow note pad. When Calley ran out of paper, [ ]gave him a white note pad on which to continue his notes.

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[1668] [ ]
Trial Testimony of Larry Cooper, April 15, 1993, at 122-139.

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Thereafter, Calley drafted the 302 of Cooper on a white note pad.

b5 b6 b7C Calley placed all of the Cooper interview notes that were written on yellow paper in the [ ] envelope belonging to the Cooper 302 file. However, he placed that portion of the interview notes that were written on white paper together with the handwritten draft of the Cooper 302 in another file folder.[

b5 b7C b6 [ ] Before the trial began, the USAO produced the two final Cooper FD-302 interview statements[1677] and the 12-page set of rough notes of the August 22 interview of Cooper.[1678]

In late May 1993, 5 weeks after the trial had started, Calley discovered the missing portions of his interview notes and the draft 302 of Cooper in his desk.[1679] Calley immediately b6 b7C informed [ ] who contacted Howen.[

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[1677] See Government Response to Discovery Stipulation, filed October 23, 1992.

[1678] See Government Sixth Addendum to Response to Discovery Stipulation, filed February 26, 1993.

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On May 21, Howen produced the newly found Calley notes to the defense.[1684] [This production occurred several days after the Fadeley compensation controversy had erupted and the same day in which Howen's interview with Captain David Neal was disclosed.[1685]] Defense counsel Spence argued that some of these notes were written by Cooper not Calley because the handwriting was different and because it was not written in the third person.[1686] The court then stated:

> The Court is going to say that the Court is very disturbed by what has happened here or what appears to have happened here, because in this instance the Court does not think counsel should make representations to the Court that they do not know. If these are in fact partly the notes of Mr. Cooper, that is the way they should be referred to. If they are the notes of someone else, they are the notes of someone else. They should have been disclosed as soon as they were found, and when they are found in the desk drawer, that seems to me like maybe it is one of the most logical places to be looking, whether they be Mr. Cooper's notes or somebody that has interviewed Mr. Cooper. The blame probably trickles down beyond the U.S. Attorney's office.[1687]

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[1684] See Government Fourteenth Addendum to Response to Discovery Stipulation, filed May 21, 1993; Trial Transcript, May 21, 1993, at 10-11.

[1685] See discussion in subsection (d), infra.

[1686] Trial Transcript, May 21, 1993, at 10-11, 26.

[1687] Id. at 27-28.

The court then expressed extreme concern over the untimely disclosure of Howen's interview with Captain Neal and ruled that he was continuing the trial until Monday, May 24 to permit the defense time to interview Captain Neal.[1688]

When the trial resumed on May 24, defense counsel Spence argued that Cooper should be returned to the stand in light of the recent production of the Calley notes which Spence argued were partially authored by Cooper. Howen objected to this request and represented that all of the notes were written by Calley not Cooper thus nothing could be accomplished by recalling Cooper. The court took the matter under advisement.[1689]

d. Neal Notes

A pivotal issue in the Weaver trial was who fired the first shot at Ruby Ridge on August 21, 1992. The government argued that it was Kevin Harris while the defense maintained that it was Deputy Marshal Roderick when he shot the Weaver dog Striker. Because of the importance of this issue to the defense case, any information that the government had regarding this issue, including pertinent statements made by Roderick, was obviously important to the defense and required to be produced under the Brady and Jencks doctrines.

On April 23, 1993, the court recessed the trial until May 3rd.[

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.[1690] The next day, Howen interviewed Captain David Neal, commander of the CRT.[

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[1688] Id. at 28-29.

[1689] Trial Transcript, May 24, 1993, at 2-7.

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Late in the afternoon of May 20, almost four weeks after the Neal interview, Howen informed defense counsel of the substance of the interview and provided them with a copy of his interview notes. At that time, Roderick had begun to testify. On the next day, defense counsel Nevin argued to the court that this disclosure was "pivotal" to the defense case[1697] and was in distinct conflict with the government's argument that Kevin Harris fired the first shot.[1698] Thereafter, defense counsel requested the court to recess the proceedings and to permit them the opportunity to interview Neal to determine the full extent of his testimony.[1699] Howen responded that he had disclosed the names of the CRT members long before the trial started and that he had not had an opportunity to interview them until the recess in April.[1700] Howen then stated:

> As counsel states when I talked to . . . Captain Neal, he made certain statements to me about Mr. Roderick coming forward. He was not able to put them in a sequence, his best recollection was because they were standing right next to the dog Mr. Roderick made a comment that he had shot the dog, and then there was an inquiry about how Mr. Degan had died, and Mr. Degan had died over here.[1701]

Howen then explained to the court that he was making the disclosure now because he had realized that he might not be calling Neal as a witness and "felt compelled to reveal this matter to defense counsel so they could examine him which is what

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[1695] (...continued)

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[1696] [ ] b5/b7C b6

[1697] Trial Transcript, May 21, 1993, at 2, 33; [ ] b6/b7C

[1698] Trial Transcript, May 21, 1993, at 3-4.

[1699] Id. at 5-9.

[1700] Id. at 12-13.

[1701] Id. at 13-14.

I did yesterday."[1702] Lindquist represented to the court that Neal had not indicated to Howen any chronology as to when he shot the dog and that the first time that Howen had heard this information was during the interview. Although Lindquist conceded that the information disclosed in the Neal interview constituted Brady material he disputed that it was "pivotal."[1703]

After expressing its concern over learning about the newly discovered notes of Special Agent Calley, the court stated,

> The thing that is even more disturbing to the Court is whether or not this chronology of events with Mr. Neal was known about three weeks ago, because obviously we are talking about Brady material rather than Jenks [sic] material. It is exculpatory if it is even questionable about what was said by Mr. Roderick shortly after the event. It is critical to a fair hearing to have this ferreted out and known about before there is any further direct or cross-examination by Mr. Roderick. We have asked these jurors to come in here and we are taking two months out of their lives. Sometimes we pass off as cavalier the time of judges, the judges being the jurors, and it is totally inexcusable when we have to do what the Court is going to have to do today, and that is delay this trial over until Monday.
>
> The Court has felt during this trial that there has been a lot of pressure on counsel. That there have been all kinds of things coming onto the Court's desk from both sides almost every day, from activities that you do through the night, and it is apparent that some things can be overlooked, some things may be not seen as important as they are, but this to the Court is a very embarrassing situation. The Court wants both sides to take stock of what has happened here and make doubly sure that this does not happen the rest of this trial.[1704]

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[1702] Id. at 14.

[1703] Id. at 16-18.

[1704] Id. at 27-29.

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e. The L-1 Bullet and L Bullet Photographs

On August 31, 1992, FBI Special Agent Larry Wages participated in the collection of evidence at the "Y" at Ruby Ridge. As evidence was located, it was marked with a flag, given a letter designation, marked on the evidence diagram and then was photographed.[1712] During the search, Wages located a bullet in the middle of the road and two other agents found additional brass and bullets. The bullet found by Wages later became known as the "L-1" bullet to the FBI and the "pristine" or the "Magic" bullet to the defense.

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] On May 25, Howen told the court that the agents had notified him that they had discovered a packet of search photographs, including pictures of the L series bullets, that had been stored at another location. Howen stated that they would produce these photographs to the defense later that day.[1728]

After the luncheon recess on May 25, defense counsel Spence complained about the late production of the photographs and argued that they should have been produced earlier in discovery.[1729] Howen argued that discovery was a continuing obligation and that he was producing materials as soon as he learned of them. He then stated, "I came to find out a couple of days ago, maybe a week or so ago, the photograph identified with the L-1 bullet was not as it was found. As a result of that, I was not going to use that particular photograph."[1730] In response to defense questions, Howen briefly explained that the bullets had been removed and then replaced later before the

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[1728] Trial Transcript, May 25, 1993, at 3.

[1729] Id. at 65-67.

[1730] Id. at 69-70.

photographs were taken. From their subsequent remarks, this was obviously the first time that defense counsel Nevin and Spence had learned about the circumstances surrounding the photographing of the L bullets.[1731]

Howen told the court that due to how the L series photographs had been taken, he did not believe that it would be appropriate to offer them into evidence. In addition, he seemed to indicate that some of the photographs produced that morning had been taken by either Michael Taister or Cyrus Grover before the bullets were removed but that Larry Wages, the testifying agent, had not been present during the taking of these photographs and thus was unaware of them.[1732] Howen then explained that Wages had removed the bullet when a photographer was unavailable and later had returned with a photographer to take the picture.[1733]

Following an afternoon recess, Spence complained that Howen had just informed him that the entire "L" series of photographs -- not just the L-1 -- had been photographed after the bullet or bullet fragment had been removed and then replaced. Spence then recounted the recent untimely disclosures that the prosecution had made including the Neal interview and the Cooper interview notes. With regard to the L series photographs, Spence maintained that they constituted Brady material that should have been disclosed "long ago" and requested the court to impose sanctions against the government and to inform the jury of what had occurred.[1734] Defense counsel Nevin echoed the concerns articulated by Spence.[1735]

Howen accepted responsibility for the late production of the photographs and told the court that it was not until the lunch recess that he was advised that the entire L series not just the L-1 photograph had been taken after having been removed and then

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[1731] Id. at 72-73.

[1732] Trial Transcript, May 25, 1993, at 73-78. Two days later, Howen stipulated that two of the photographs were taken by Cyrus Grover and depicted the L-1 bullet before it was picked up. Trial Testimony, May 27, 1993, at 126-27.

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[1733] Trial Transcript, May 25, 1993, at 77.

[1734] Id. at 125-30.

[1735] Id. at 130-32.

replaced. Howen argued that he had produced the materials as soon as he became aware of them and that he did not believe that the defense request for sanctions was appropriate.[1736] The court accepted Howen's representations that the information and the photographs had been disclosed as soon as they had been discovered and refused to impose sanctions or to inform the jury as requested by the defense.[1737]

Two days later, Larry Wages testified and described the August 31 search at the Y and explained that the items seized were given the designation of "L". He then testified that in the early afternoon he was informed that Mike Dillon wanted him to go to another area. Because the bullets had not been photographed with a letter and number designation, Wages decided to take the evidence with him. Thereafter, he picked up the L-1, L-2 and L-3 bullets, marked the location where the bullet had been with a wire flag or a piece of wire, placed the bullets in a plastic bag, labeled them and then took them with him. At about 6:00, he returned to the Y, replaced the bullets and had Kelly Kramer, the photographer, take a picture of the bullets with the letter and number designation.[1738]

Towards the end of the direct examination, Howen asked Wages a series of questions about how Howen learned the circumstances surrounding how the L series photographs were taken. Wages testified that he had first discussed this subject with Howen about one week before the trial started, that Howen had taken notes of this discussion and that Wages had reminded Howen of this conversation during the weekend preceding Wages' scheduled testimony.[1739] Based on comments that defense counsel made later that day, it appears that Howen had not notified defense counsel about his prior knowledge until the previous night when he had agreed to inform the court of this knowledge.[1740]

On cross-examination, Wages admitted that he had not marked the direction in which the bullet was pointing and, thus, he may not have replaced it in exactly the same position. In addition,

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[1736] Id. at 132-35.

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[1737] Trial Transcript, May 25, 1993, at 135-37.

[1738] Trial Testimony of Larry Wages, May 25, 1993, at 14-21.

[1739] Id. at 37-39.

[1740] Trial Transcript, May 27, 1993, at 102-03.

Wages testified that Rampton had called him sometime in early January 1993 and inquired why the search times on the 302 that he prepared on the search and the search times on pertinent documents did not agree concerning the time that the search ended. At that time, Wages explained to Rampton the circumstances surrounding the taking of the photographs.[1741]

f. The Late Production of the Shooting Incident Report and Supporting Materials and the October 26, 1993 Court Order

The circumstances surrounding the late production of the subpoenaed version of the shooting incident report and supporting materials were discussed earlier in Section IV(M) of this report. One of the newly produced documents included a diagram of the Weaver cabin prepared by HRT sniper Horiuchi which detailed the second shot that Horiuchi took on August 22, 1992. As a result of this late disclosure the court ordered Horiuchi to return for additional cross examination and imposed sanctions on the Government by requiring it to pay the court costs and attorneys fees caused by the delay.[

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Almost four months after the jury returned its verdict, Judge Lodge issued an order imposing a $1920 fine against the FBI. This fine represented the attorneys fees paid to defense counsel when Horiuchi returned for cross examination. In this order, Judge Lodge criticized the FBI efforts to produce discoverable materials including Jencks and Brady documents and stated that one of the primary reasons that a continuance of the February 2, 1993 trial date was necessary was because of the failure of the government to produce certain critical items of evidence such as the ballistics evidence and the weapons seized. He then stated:

> In hindsight, it is clear that even prior to this meeting, the Assistant United States Attorneys Howen and Lindquist were receiving less than full cooperation from the FBI and that items of evidence were not being produced timely. It later became clear that a pattern of delay and lack of cooperation was manifesting itself despite the efforts of the local Assistant United States Attorneys. Once the items and information were received in the local office of the United States Attorney, Howen and Lindquist continually assured the court that

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[1741] Wages Trial Testimony, May 25, 1993, at 130-31.

> they were producing the materials for the defense as quickly as arrangements could be made.[1742]

Judge Lodge recounted the incidents when the Government had been late in producing discoverable material during the Weaver trial. First, he noted that seven of the addenda to the government's discovery response, which were filed on the eve of trial and during the trial, contained FBI materials.[1743] Next, the court traced the history of the defense effort to obtain a copy of the Horiuchi personnel file. The court then noted that on May 18, 1993, five weeks into the trial, the FBI produced lab reports of the test firings of the weapons. Next, the court discussed the late disclosure of the Calley notes, the Neal interview, the package of photographs taken by the FBI and the circumstances surrounding the taking of the L series photographs. The final offending incident was the late production of the shooting incident materials in response to the defense subpoena.[1744]

After discussing the importance of discovery to the rights of the defendant and the obligation of the government to produce such materials, including Brady materials, as quickly as possible, the court stated:

> Here, the FBI failed to produce materials in a timely fashion. They failed to provide Jencks and Brady materials. They failed to obey orders and admonitions of this court. Their failures necessitated the initial continuance of the trial of this matter. Once the matter had begun, their continued failures necessitated continuous discussion between court and counsel and continuous prodding of the FBI by the court. The culmination of this was the late receipt of the Horiuchi materials. . . .

[1742] Order in United States v. Weaver, No. CR 92-080-N-EJL, filed October 26, 1993, at 2.

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[1744] Order, October 26, 1993, at 3-8.

> The failure to provide the Horiuchi materials was the latest transgression in a series of transgressions. This failure occurred on day 33 of a trial at which the government presented evidence a total of 37 days. At the time of the Horiuchi material incident it was unclear how much longer the government would be presenting its case. The court was concerned with the length of trial for a host of reasons, not the least of which was the fact the court was the only active judge in the district, responsible for matters in Coeur d'Alene, Moscow, and Pocatello, Idaho, and all administrative matters in the district. In this light, the FBI's recalcitrance was especially frustrating. The court had an obligation to the defendants to ensure they had all the materials to which they were entitled and an obligation to the federal litigants in the District of Idaho to keep the calendar moving. The actions of the FBI impeded the court in both of these areas. With no idea as to how much information was yet to be divulged by the FBI, and no idea how much longer the government's case in chief would take, the failure to produce the Horiuchi materials forced the court's action. Previous orders and admonitions had proved to be of no value. Accordingly, the court had no option but to impose a sanction both as punishment for ignoring previous orders and to secure compliance and cooperation during the remainder of the trial.[1745]

Thereafter, the court concluded that the FBI had failed to comply with its discovery obligations under Rule 16 and found the FBI to be in contempt of court in violation of 18 U.S.C. § 401. In support of its ruling, the court held:

> The FBI was a principal participant in the Weaver/Harris criminal proceeding. Its behavior served to obstruct the administration of justice in that proceeding. Its behavior brought about delays and countless arguments outside the presence of the jury. These delays and arguments, which obstructed the progress of the trial, would not have been necessary had the FBI acted as it had been directed to act. The failure to act occurred in the courtroom where the government, through its agent, was directed

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[1745] Id. at 9-10.

> to act. All performance by these government agents revolved around this court and this trial. All work performed by the [sic] these agents directly impacted these defendants. The actions of the government, acting through the FBI, evidence a callous disregard for the rights of the defendants and the interests of justice and demonstrate a complete lack of respect for the order and directions of this court.[1746]

3. Discussion

a. Response of the Government to the Defense Subpoena for FBI and Marshals Service Manuals and Personnel Files

Issues were raised during our investigation as to whether the government responded appropriately to the defense subpoenas seeking the production of the FBI and Marshals Service manuals and certain personnel files. With regard to the response of the government to the production of the manuals, we find their efforts to be acceptable.[

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]Pursuant to Fed. R. Crim. P. 16(a)(1)(C), the government is obligated to produce upon request discoverable materials that "are within the possession, custody or control of the government." This obligation is not limited to the materials within the possession of the prosecutor but rather extends to all materials over which the prosecutor has knowledge and access. See United States v. Bryan, 868 F.2d 1032,

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[1746] Id. at 13.

1036 (9th Cir.), cert. denied, 493 U.S. 858 (1989). A prosecutor is "deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." Id. To conclude otherwise would "unfairly allow the prosecution access to documents without making them available to the defense." United States v. Robertson, 634 F. Supp. 1020, 1025 (E.D. Cal. 1986), aff'd, 815 F.2d 714 (9th Cir.), cert. denied, 484 U.S. 912 (1987).

b6 b7C [ ] the prosecutor in the case, was responsible for coordinating the government's response to its discovery obligations.[

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Turning to the response of the government to the defense subpoena for the personnel files, we note at the outset that the court expressed concern over the manner in which the FBI responded to the subpoena for the Horiuchi personnel file but made no mention of the response of the Marshals Service to a similar subpoena for the personnel files of the marshals at Ruby Ridge on August 21, 1992. As framed, the subpoenas requested the complete personnel files of the named individuals. We find that the protective order sought by the government was solidly based in the law. Indeed, the court ultimately concluded that a Henthorn review rather than production of the entire personnel file was an adequate response to the request.[

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b. Failure to Disclose Financial Compensation Arrangement with Informant Fadeley

There can be no doubt that the defense was entitled to have been informed that Fadeley might receive an award for his work on the Weaver case. Although we find the government responsible for this failure to provide critical information to the defense, we do not believe that the omission was improperly motivated.

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5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)

c. Late Production of the Calley Notes

Five weeks into the trial and after the testimony of Deputy Marshal Cooper, Special Agent Calley found notes in his desk that he had taken during his interview of Cooper as well as part of his draft FD-302 of the interview.[

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]Responsibility for this incident must rest with the FBI.

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the materials that were being produced to the USAO in discovery. All documents associated with the interviews of the marshals present at Ruby Ridge on August 21, 1992 were critical to both the prosecution and the defense. Indeed, such documents were among those that both sides were most anxious to review. Thus, we would have expected the FBI to have been more thorough in its examination of these materials before it produced them.[

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d. Late Disclosure of the Neal Interview

Under the rule articulated by the Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963), the prosecution has an affirmative duty to disclose to the defense evidence that is both favorable to the accused and material to either guilt or punishment. Failure to make disclosure of such evidence violates the due process rights of the defendant "irrespective of the good faith or bad faith of the prosection." Id. at 87. The prosecution has the constitutional obligation to disclose such information even in the absence of a specific request from the defense. See United States v. Agurs, 427 U.S. 97 (1976).

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The prosecutor is only required to disclose materially favorable evidence. Evidence favorable to the accused is evidence which, if disclosed and used effectively, may make the difference between conviction and acquittal. United States v. Bagley, 473 U.S. 667, 676 (1985), citing, Brady v. Maryland, 373 U.S. 83, 87 (1963) and Napue v. Illinois, 360 U.S. 264, 269 (1959). Evidence is material only if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. See also Pennsylvania v. Ritchie, 480 U.S. 39 (1987). For example, evidence which supports an affirmative defense or corroborates the defendant's testimony is materially favorable evidence which must be disclosed. United States v. Hibler, 463 F.2d 455, 459-60 (9th Cir. 1972).

The prosecutor is not obligated to disclose all information in his case file which might be helpful to the defense, United States v. Agurs, 427 U.S. at 109-11, nor is he required to disclose "every bit of information that might affect the jury's decision." United States v. Little, 753 F.2d 1420, 1441 (9th Cir. 1984). The prosecutor has no duty to disclose evidence which is neutral or inculpatory. United States v. Bryan, 868 F.2d 1032, 1037 (9th Cir. 1989). However, if a prosecutor fails to disclose evidence that results in depriving a defendant of his right to a fair trial, that prosecutor has breached his "constitutional duty to disclose." United States v. Agurs, 427 U.S. at 108. It is for this reason that a "prudent prosecutor will resolve doubtful questions in favor of disclosure." Id. See also United States v. Miller, 529 F.2d 1125, 1128 (9th Cir.), cert. denied, 426 U.S. 924 (1976).

Applying these standards to the information that Howen learned at the Neal interview, we must conclude that the information was subject to disclosure as Brady material as well as being a statement of Roderick that should have been produced as Jencks material. One of the critical issues in the case was who fired the first shot at Ruby Ridge. To the extent that Howen had any knowledge or information about this issue he was constitutionally obligated to produce it to the defense. We deem the substance of his April 24 interview with Captain Neal to constitute such information.

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] Although the Supreme Court has yet to rule on the timing of when exculpatory evidence must be produced, most courts require that Brady material must be disclosed in time for effective use at trial. As the Ninth Circuit held in United States v. Gordon, 844 F.2d 1397, 1403 (1988), "Brady does not necessarily require that the prosecution turn over exculpatory material before trial . . . . [but] disclosure must be made at a time when disclosure would be of value to the accused." When exculpatory information is disclosed at trial, a Brady violation only occurs if the defendant was prejudiced by the delay in disclosure. See United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991).

It was not until the midst of Roderick's testimony -- the witness to whom this information was pertinent -- that Howen made disclosure to the defense.[

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However, from a strictly analytical perspective, the defendants were probably not prejudiced from the action and, thus, a Brady violation did not occur. When this problem surfaced, the court called a recess to give defense counsel an opportunity to interview Neal. Thereafter, they were able to

explore the issue with Neal and to use this information when conducting their cross-examination of Roderick. Furthermore, based on the jury verdict returned on the assault on a federal officer charges it is difficult to conclude that the defendants suffered prejudice from the late disclosure of this information.

Even if the defendants did not suffer any actual prejudice by the delay in revealing the Neal interview, [ ] Although there are no internal Department of Justice guidelines governing the appropriate time for disclosure of Brady materials, we believe that the prompt disclosure of exculpatory information is the better practice. The American Bar Association has adopted such a rule. Standard 3-3.11(a) of the ABA Standards for Criminal Justice: The Prosecution Function (3d ed. 1992) provides that,

> A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

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[ ] We found no evidence in our investigation that Howen's decision was improperly motivated. [

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e. The L Bullet Photographs

Several days after the controversial disclosures of the Calley notes and the Neal interview, Howen was tasked with informing the court of yet another serious omission by the government. As with the Neal interview, the responsibility for failing to inform the court and defense counsel earlier about the circumstances surrounding the taking of the L series photographs[1756] must be assigned to Howen

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[1757]

We do not believe that Howen intentionally withheld this information from the court and defense counsel

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[1756] An evaluation of the conduct of the FBI in removing, replacing and photographing the evidence as described by Wages is discussed in Section IV(I) of the report.

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and
5 U.S.C. 552 (b)(7)(C)

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]There was no evidence found indicating that anyone from the government intentionally concealed these pictures.[

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1762] We think that the USAO must accept responsibility for this oversight.

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4. Conclusion

The late disclosures by the government of important information during the Weaver trial were unnecessary, were embarrassing and damaged the integrity of the government.[1765] As was previously discussed in section IV(M) of our report, the late production of materials related to the shooting incident report were particularly devastating to the prosecution. The FBI is responsible for that incident. We hope that corrective procedures are instituted to prevent a similar occurrence in the future. The FBI is also responsible for the late production of the Calley notes. Although we do not view that incident as having been intentional, we think that if more care and attention had been directed to the original search and production of the materials, it would have been avoided.

The FBI was not singularly responsible for the late disclosure of information -- the USAO also neglected to reveal information in a timely fashion. Although the predominant blame for the late disclosure of the information pertinent to the Fadeley compensation arrangement rests with BATF[ ] we find that[ ]should have been more aggressive in discovering this crucial information. The failure to reveal the Neal interview and the circumstances surrounding the taking of the L series photographs were also extremely damaging to the credibility of the government. Both incidents were avoidable; both incidents were the fault of[ ]Although we do not find evidence of improper motivation, we remain concerned by the lack

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of timeliness of disclosures, and faulty judgment in assessing the importance of these issues.

V. RECOMMENDATIONS

Law enforcement officials confronted fundamental and recurring problems of crisis management at Ruby Ridge.

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We offer recommendations emanating from the Ruby Ridge situation.

1. The Policy for the Use of Deadly Force and the Authorization Structure for Rules of Engagement Must be Standardized for All Federal Law Enforcement Agencies.

We believe that all federal law enforcement officers should be governed by a standard deadly force policy. Thus, we recommend that the Department of Justice establish a universal policy on the use of deadly force to govern the law enforcement components within the Department and to serve as a model for other agencies.

We have concluded that the special Rules of Engagement in force at Ruby Ridge violated the Constitution of the United States. We also found that the poorly drafted and ambiguous rules created confusion among those who were obliged to make instantaneous, life and death decisions while attempting to obey the requirements of the rules.

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when special rules of engagement are necessary, established review and authorization procedures must be in place.

Recently, the Department of Justice established the Office of Investigative Agency Policy, headed initially by the Director of the FBI. We suggest that Office may be best equipped to develop a standardized policy on the use of deadly force and to formulate procedures for formulating and authorizing special rules as needed.

2. Crisis Response Teams Need to be Created

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it is imperative that specially trained crisis managers, familiar with relevant tactical, behavioral, and scientific disciplines, be available to

respond to crises.

65 We recommend that specially trained crisis managers should be deployed for that purpose.

We enthusiastically endorse

that the FBI Crisis Response Team include specially trained prosecutors to provide legal support to tactical teams.

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we propose periodic joint training exercises by enhanced Crisis Response Teams, HRT, FBI SWAT teams and other federal and local law enforcement agencies.

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3. A Multi-Agency Review with DOJ Representation Should be Established to Review Shooting Incident Reports

We found that the FBI review of the shooting incident at Ruby Ridge was not sufficiently thorough or accurate. We recommend that all internal reviews of shooting incidents by federal agencies be scrutinized by a board of representatives of law enforcement agencies prior to the close of the internal review process. The board should include at least one DOJ attorney with special expertise in this area.

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4. Coordination Must Be Improved Between the FBI and Prosecutors in Regard to Discovery

Significant problems in the Ruby Ridge prosecution arose in the discovery process. The FBI delayed giving prosecutors the documents they needed for trial preparation and to provide to the defense in discovery.

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We recommend that

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the FBI should denominate a unit within the Bureau to coordinate and monitor discovery in a timely and thorough manner. Finally, the Department of Justice should establish guidelines governing the production of FBI material.

5. Coordination Among the FBI Crime Scene Investigation Team, the FBI Laboratory, and the Prosecutors Must Be Improved

Our report is critical of the crime scene investigation at Ruby Ridge.

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To increase the chances of a successful prosecution, FBI Headquarters should mandate that its evidence response team be used in situations like Ruby Ridge to conduct systematic and thorough crime scene investigations.

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We also recommend that the FBI assign an agent familiar with the theory of the case, the evidence, anticipated defenses, and FBI forensic capabilities to coordinate the prosecution's interaction with the Laboratory.

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We also recommend that the FBI reevaluate its policy on memorializing witness interviews

6. U.S. Attorneys' Offices Should Establish A Formal Indictment Review Process

We recommend that significant indictments be formally reviewed by a committee of Assistant U.S. Attorneys within a particular office, who have been thoroughly briefed on the theory of the case, the evidence, and anticipated defenses or problems.

7. Other Recommendations

We recommend that our analysis of the conduct of Assistant U.S. Attorney Ronald Howen be referred to the Executive Office for United States Attorneys for whatever action it deems appropriate.

Finally, we recommend that our findings concerning the events surrounding the shooting of Vicki Weaver by the FBI sniper/observer on August 22, 1992 and the Rules of Engagement under which he operated be referred to the appropriate component of the Department of Justice for an assessment of its prosecutive merit.

VI. CHRONOLOGY OF EVENTS

DATE	EVENT
January - May 1985	U.S. Secret Service ("USSS") investigates allegations from neighbors of Randy Weaver that Weaver threatened to kill President Reagan, Idaho Governor John Evans and other unspecified law enforcement officials. USSS learns through interviews that Weaver associates with members of the Aryan Nations.
	USSS interviews Weaver who denies affiliation with Aryan Nations and denies making threats against President Reagan and Governor Evans. No charges are filed against Weaver as result of alleged threats.
	On February 28, 1985, Weaver and his wife, Vicki Weaver, file affidavit with Boundary County Idaho clerk claiming that false allegations made to USSS were part of a plot designed to provoke federal authorities into storming their home. Weaver writes he "may have to defend myself and my family from physical attack on my life."
	[redacted]
July, 1986 - July 1989	BATF informant Kenneth Fadeley introduced to Weaver at World Aryan Congress, Hayden Lake, Idaho. Fadeley meets Weaver again in January 1987 and at July 1987 and July 1989 Aryan World Congresses. At July 1989 Congress, Weaver invites Fadeley to his house to discuss forming group to fight against "Zionist Organized Government" (ZOG).
October 11, 1989	BATF informant Fadeley meets with Weaver at restaurant in Sandpoint, Idaho at which time Weaver says he could supply sawed-off shotguns.

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DATE	EVENT
October 24, 1989	Weaver sells two sawed-off shotguns to BATF informant Fadeley in a park in Sandpoint, Idaho. Fadeley breaks contact with Weaver following November 30, 1989 meeting, when Weaver accuses Fadeley of being a "cop".
[ ] [	]
June 12, 1990	BATF agents [ ] and [ ] approach Weaver in Sandpoint, Idaho, and attempt to enlist him as an informant regarding illegal activities of Aryan Nations members. Weaver says he won't be a "snitch."
December 13, 1990	A federal grand jury in the District of Idaho indicts Weaver for manufacturing and possessing unregistered firearms in violation of 26 USC § 5861(d), (f).
January 17, 1991	BATF agents, posing as stranded motorists, arrest Weaver on weapons charge. Weaver tells the arresting agents, "nice trick; you'll never do that again."
January 18, 1991	Weaver arraigned before U.S. Magistrate Judge Stephen M. Ayers in Coeur d'Alene, Idaho. Judge Ayers appoints Everett Hofmeister as counsel for Weaver, releases Weaver on a $10,000 Personal Recognizance Bond and directs Weaver to appear at U.S. District Court for trial on February 19, 1991.
January 22, 1991	Weaver calls Karl Richins pursuant to the terms of his conditions of release.
February 5, 1991	U.S. District Court Clerk in Boise, Idaho, sends a notice to the parties that the trial date has been changed to February 20, 1991

DATE	EVENT
February 7, 1991	The U.S. Attorney's office in Boise, Idaho receives two letters from Vicki Weaver dated January 22, 1991 and February 3, 1991 and addressed to "the Queen of Babylon." Because the letters appeared to contain veiled threats they are provided to the Boise office of the U.S. Marshals Service for a threat assessment.
February 7, 1991	U.S. Probation Officer Karl Richins sends Randy Weaver a letter requesting Weaver to contact him and then erroneously refers to the trial date as March 20, 1991 rather than the correct date of February 20, 1991.
February 20, 1991	Weaver does not appear for trial on either February 19 or February 20 and Chief U.S. District Court Judge Harold Ryan issues a bench warrant for Weaver.
[ ] [	]
March 14, 1991	A federal grand jury in the District of Idaho indicts Weaver for failure to appear.
[ ] [	] requests assistance from the Marshals Service's Special Operations Group ("SOG").
[ ] [	] The decision is made to send SOG team to Idaho to gather information to develop plan to arrest Weaver.

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DATE	EVENT
June 17-24, 1991	SOG reconnaissance team travels to Northern Idaho and conducts assessment of the Weaver case. The team develops a plan for the safe arrest of Weaver[ ]
July 9, 1991	Deputy Marshal[ ]and Weaver's appointed counsel, Everett Hofmeister, meet with [ ]and ask[ ]to try and convince Weaver to surrender.[ ]
[ ]	[ ]
October 9, 1991	[ ]and[ ]ask[ ]a friend of the Weavers, to convey an offer of negotiations to Weaver. The marshals formulate formal surrender terms.
[ ]	[ ]
October 17, 1991	Assistant U.S. Attorney[ ]sends letter to[ ]and[ ]directing that all contact with Weaver must be through Weavers' appointed counsel, Everett Hoffmeister.[ ]
March 4, 1992	Deputy Marshal Cluff and Chief Deputy Marshal Evans drive up to Weaver property in an unmarked vehicle. They are met by Randy Weaver, who is armed with a rifle. Weaver tells Cluff and Evans that they are trespassing and the marshals leave without incident.

DATE	EVENT
March 27, 1992	Acting Marshals Service Director Henry Hudson was briefed on developments in the Weaver case. Hudson asks U.S. Attorney Maurice Ellsworth to consider dismissing warrant and reissuing it under seal. Ellsworth rejects the proposal. Hudson directs that any plan to arrest Weaver must eliminate possibility of harm to Vicki Weaver and the Weaver children.
	Marshals Service Enforcement Division Branch Chief Arthur Roderick is given primary responsibility for devising a suitable plan to arrest Weaver. Three phase operation plan is developed.
April 2-12, 1992	During Phase I of their operation plan, the marshals conduct surveillance of the Weaver property and determine technical requirements for additional surveillance.
April 13, 1992	Acting Director Hudson approves operation plan for Phase II, during which surveillance cameras would be utilized to gather information about Weavers' daily actions so that options could be developed for Phase III, the actual arrest of Weaver.
April 17 through 1st Week of May, 1992	Marshals install surveillance cameras on ridges overlooking Weaver property and make three fact-finding trips onto the Weaver property.
April 18, 1992	Marshals Service are informed that the television crew from Geraldo Rivera's program "Now It Can Be Told" may have been shot at while flying over the Weaver property in a helicopter.
May 5, 1992	Marshals Service surveillance camera stolen from the north ridge overlooking the Weaver property.

DATE	EVENT
May 27, 1992	Undercover plan developed by Marshals Service Undercover operation contemplates Marshal Service surreptitiously buying a plot of land north of the Weaver property and that two deputy marshals, posing as husband and wife, would visit and develop the property, and that eventually an opportunity would arise to arrest Weaver out of the presence of other family members. Plan put on hold pending Hudson's confirmation as Director by U.S. Senate.
Early August, 1992	Hudson gives verbal approval to the undercover plan after being confirmed as Marshals Service Director.
August 17, 1992	Deputy Marshals Degan, Cooper, Roderick, Norris, Thomas and Hunt arrive in Northern Idaho to update intelligence for undercover plan.
Friday, August 21, 1992	
	At 4:30 a.m., Marshals Service team arrives park their vehicle and move to surveillance positions on Ruby Ridge.
	The team splits into two three-man teams at the "Y." The observation post ("OP") team (Hunt, Norris and Thomas) goes to site above the Weaver compound while the reconnaissance ("Recon") team (Roderick, Cooper and Degan) proceeds up the trail from "Y" toward the Weaver compound.

DATE	EVENT
Friday, August 21, 1992	[ ]the Recon team joins the OP team at the observation post above the Weaver compound[ ]The Recon team proceeds to area 200-250 yards from the Weaver cabin where Roderick tosses rocks in the direction of the Weaver compound. The Recon team moves to garden/spring house area below the Weaver cabin.
	At 10:00 a.m., while Recon team gets ready to leave garden/spring house area,[ ]at the observation post, radios that a vehicle is approaching and that the Weavers are responding. Recon team retreats through the woods toward the fern field while pursued by Kevin Harris and the Weaver dog, Striker. As the Recon team passes the fern field proceeding towards the "Y", Sammy Weaver is seen with Harris and the dog in pursuit.
	At 10:30 a.m., a gun battle occurs at the "Y", in which Deputy Marshal Degan and Sammy Weaver are killed. Upon hearing the shots the OP team runs through the woods to assist the Recon team and are fired upon when running from the fern field to the "Y." None of the marshals are aware that Sammy Weaver has been shot and killed.
	At 10:45 a.m., Hunt and Thomas leave the "Y" to [ ]to call for assistance. Roderick, Cooper and Norris stay with Degan's body.
	At 11:20 a.m., Hunt makes a 911 emergency call to the Boundary County Sheriff's office, Bonners Ferry, Idaho.
	At 11:40 a.m., the Marshals Service Crisis Center is activated under the direction of Duke Smith, Associate Director for Operations. The Marshals Service Special Operations Group ("SOG") is alerted to deploy.[ ]
	At 1:30 p.m., in Washington, D.C., Marshals Service Director Hudson and other Marshals Service officials meet with FBI Associate Deputy Director Douglas Gow and FBI Assistant Director Larry Potts to discuss the response to the shooting and the marshals predicament on Ruby Ridge.

DATE	EVENT
Friday, August 21, 1992	In the late afternoon, Assistant Director Potts orders the FBI Hostage Rescue Team ("HRT") deployed.
	At 6:30 p.m., HRT Commander Richard Rogers and the advance team of HRT personnel depart for Idaho accompanied by Marshals Service Director of Operations Duke Smith. While en route, Rogers has a series of conversations with Assistant Director Potts and Deputy Assistant Director Coulson about proposed Rules of Engagement.
b6 b7C	At 1:00 p.m., the Idaho State Police Critical Response Team ("CRT") is informed of the incident and proceed to form a command post [ ]
	At 8:30 p.m., Idaho State Police CRT leaves the command post to rescue Deputy Marshals Roderick, Cooper and Norris and the body of Deputy Marshal Degan.
	At 9:30 p.m., FBI Special Agent in Charge Gene Glenn arrives at the command post at Ruby Ridge. Glenn assumes overall responsibility for the FBI operations at Ruby Ridge.
b6 b7C	In the afternoon, U.S. Marshal [ ] notifies U.S. Attorney Ellsworth of the shooting at Ruby Ridge. Ellsworth sends Ron Howen to Ruby Ridge to act as the U.S. Attorney's representative. Howen arrives at Ruby Ridge late in the evening.
Saturday, August 22, 1992	At 1:00 a.m., Idaho State Police CRT arrives back at the command post and brings with it the three deputy marshals and the body of Deputy Marshal Degan. Thereafter, the marshals are taken to the Boundary County Hospital for examination [
b5	[ ] Sometime in the afternoon, FBI agents interview the marshals involved in the August 21 incident. A criminal complaint is filed charging Weaver and Harris with murder of Deputy Marshal Degan in violation of 18 U.S.C. §§ 111, 1111 and 1114.
	At 4:45 a.m., the HRT advance team arrives at the command post.

DATE	EVENT
Saturday, August 22, 1992	At 9:00 a.m., HRT Commander Rogers briefs HRT members at the National Guard Armory, Bonners Ferry, Idaho. The Rules of Engagement are still being drafted.
b5 b5	[redacted]
	[redacted] the operations plan, including Rules of Engagement, are sent to FBI Headquarters and the Marshals Service for review.
	Between 2:30-3:30 p.m., the HRT sniper/ observers briefed on approved Rules of Engagement and depart on foot to their observation posts on the mountain.
	From 5:07 p.m. to 5:22 p.m., the HRT sniper/ observer teams arrive at their positions on the ridge overlooking the Weaver cabin.
	At Approximately 5:58 p.m., HRT sniper/observer Lon Horiuchi fires round which wounds Randy Weaver. Seconds later, Horiuchi fires a round which kills Vicki Weaver and wounds Kevin Harris.
	At 6:30 p.m., an Armored Personnel Carrier ("APC") arrives at the cabin area. FBI hostage negotiator delivers message over loud speaker that there are arrest warrants for Randy Weaver and Kevin Harris and asks Weaver to accept negotiations telephone.
	At 8:00 p.m., HRT sniper/observer teams and SOG personnel are withdrawn from their mountain observation posts because of cold weather. During the evening, FBI SWAT teams are deployed around the command post and control access to the road leading to the Weaver cabin.
Sunday, August 23, 1992	At 6:00 a.m., the HRT teams are sent back to their position on the mountain and arrive there at about 7:30 a.m.
	HRT Commander Rogers takes two teams of HRT personnel to the Weaver cabin area, and makes repeated announcements over bull-horn for those inside to enter into negotiations. No response is heard.

DATE	EVENT
Sunday, August 23, 1992	At 8:01 p.m., APCs are used to remove outbuildings near the Weaver cabin. During the clearing of the birthing shed the body of Sammy Weaver is found in the shed.
Monday, August 24, 1992	Negotiators try to make contact with Randy Weaver using a loud speaker. They address Vicki Weaver for the first time. No response is heard from the cabin. Assessment sent to crisis site includes proposal to use third parties in negotiations.
August 24, 27-31 and September 1, 1992	FBI conducts searches of the "Y" area.
Tuesday, August 25, 1992	Negotiators continue efforts for Weaver/Harris group to surrender. These efforts include statements directed specifically at Vicki Weaver. No response is heard from the cabin.
Wednesday, August 26, 1992	At 10:53 a.m., The Rules of Engagement that were in effect since the arrival of the HRT on August 22 are revoked. At the direction of Glenn, the FBI's Standard Deadly Force Policy replaces the Rules of Engagement to guide law enforcement personnel deployed on cabin perimeter concerning the use of deadly force..
	At approximately 3:00 p.m. the first contact is made with Randy Weaver. Weaver says he wants to talk to his sister,[ ]
Thursday, August 27, 1992	[ ]attempts to speak with Randy Weaver, but is unsuccessful.
Friday, August 28, 1992	Further attempts by[ ]to speak with Weaver are unsuccessful. At 5:15 p.m., Weaver states he will talk to Bo Gritz.
	At 6:58 p.m., Bo Gritz enters the Weaver compound in APC. Gritz speaks with Weaver at the cabin. Weaver advises him that Vicki Weaver was killed and that he and Kevin Harris have been wounded.

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DATE	EVENT
Saturday, August 29, 1992	Gritz and Weaver family friend, [redacted] speak with Weaver, his daughter and Kevin Harris at the cabin.
	[redacted]
Sunday, August 30, 1992	In mid-morning, Harris decides to surrender after talking with Gritz and [redacted] assisting Gritz in the negotiations.
	At 6:27 p.m. [redacted] and Bo Gritz carry Vicki Weaver's body from the cabin. After delivering the body, [redacted] returns to the cabin to clean the blood from the floor.
Monday, August 31, 1992	At 9:40 a.m., Gritz and [redacted] return to the cabin to begin negotiations. Later, Randy Weaver and his children surrender.
	In the late morning, FBI Special Agent Larry Wages discovers bullet intact at center of the "Y." Because a photographer was unavailable to label and photograph the bullet, Wages removed it before participating in a search of the Weaver cabin. Later that day he returned the bullet and had it photographed at the spot where it was originally retrieved. This bullet later receives the designation L-1 and is referred to as the "pristine bullet" by the defense.
August 31, September 1 and September 10, 1992	Searches of the Weaver cabin, grounds and outbuildings are conducted under the supervision of the FBI.
[redacted]	[redacted]
September 10, 1992	A combined preliminary examination and detention hearing for Weaver begins before U.S. Magistrate Judge Williams.

DATE	EVENT
September 11, 1992	U.S. Attorney Ellsworth argues motion to continue preliminary hearing of Harris from September 14 to September 15. He enters into stipulation with defense counsel Nevin and represents that Harris will have a preliminary hearing on September 15.
September 15, 1992	Preliminary Hearing of Harris begins before U.S. Magistrate Judge Boyle. New grand jury for the United States District Court for the District of Idaho is sworn in.
September 16, 1992	Grand Jury indicts Harris and Weaver for the assault and murder of Deputy Marshal Degan. Defense Counsel Nevin makes an oral motion to quash the indictment against Harris. Magistrate Judge Boyle took the matter under advisement and began the detention phase of the hearing. After hearing argument from the parties Judge Williams, who was presiding over the Weaver preliminary hearing decided to terminate that hearing and to proceed to the detention hearing phase.
September 17, 1992	Judge Boyle denies Harris' motion to quash the indictment and begins the detention phase of the proceeding.
	Weaver pleads not guilty to aiding and abbetting Deputy Marshal Degan's murder.
September 18, 1992	Harris pleads innocent to murdering Deputy Marshal Degan.
[ ]	[ ]
September 30, 1992	The investigative team from the FBI Inspection Division issues a Shooting Incident Report - which contained its findings from its administrative inquiry into the shootings by the HRT at Ruby Ridge.

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DATE	EVENT
October 1, 1992	The grand jury returns a superseding 10 count indictment against Weaver and Harris which added a conspiracy count, among others, to earlier charges.
October 16, 1992	The Government and the defendants enter into a discovery stipulation to provide the reciprocal disclosure of materials.
Late October, 1992	Deputy Marshals [ ] and [ ] and BATF Agents [ ] and [ ] are assigned to assist the USAO in preparing the case for trial.
[ ]	[ ]
November 9, 1992	The FBI Shooting Incident Review Group issues a 4-page report concluding that no administrative action necessary regarding the shootings by the HRT at Ruby Ridge.
November 16, 1992	Weaver and Harris file formal motions to dismiss the indictments against them alleging that their preliminary hearings had been improperly terminated.
November 19, 1992	The grand jury returns a Second Superseding Indictment against Weaver and Harris. The indictment charges violations of 18 U.S.C. 2, 3, 111, 115, 371, 922(g)(2), 924(c)(1), 1071, 1111, 1114, 3146(a)(1) and 3147 and 26 U.S.C. 5861(d) and (f). The case proceeds to trial on this indictment.

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DATE	EVENT
January 6, 1993	Magistrate Judge Williams issues a Report, Recommendation and Order denying Weaver's motion to dismiss because of the alleged improper termination of the Weaver preliminary hearing.
January 6, 1993	Magistrate Judge Boyle issues Report, Order and Recommendation denying Harris' motion to dismiss because of alleged improper termination of the Weaver preliminary hearing.
January 8, 1993	A conference is held in the chambers of U.S. District Judge Lodge. The defense requests a trial continuance from February 2, 1993 due to the volume of evidence and because the FBI Laboratory examinations were not completed and provided. Judge Lodge admonishes the prosecutors to have the FBI Laboratory complete the exams and provide the results to the defense quickly.
	Weaver and Harris file a joint Motion to Disqualify the U.S. Attorney's Office, To Dismiss the Indictments, To Strike Prejudicial Allegations, To Order an Evidentiary Hearing and for a Continuance Pending an Investigation by the U.S. Attorney General and Pending Interlocutory Appeals by the Parties.

DATE	EVENT
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February 17, 1993	District Judge Lodge issues order adopting ruling of the magistrate judges to reject Weaver and Harris' motion to dismiss the indictments based on the alleged improper termination of the preliminary hearing.
March 22-23, 1993	Additional searches of the "Y" and the Weaver cabin and grounds are conducted.
b5	[redacted]
April 7, 1993	Prosecution produces the Shooting Incident Report to the defense.
Early April 1993	
b5/b7C b6	[redacted] Wages informs Howen that the "Y" scenes pnotographs were taken after the bullets had been removed and replaced [redacted]
April 10, 1993	Prosecution produces the Situation Reports and the Operations Plan to defense.
April 12, 1993	Prosecution produces the Shooting Incident Review Group memo and the Marshal's Critique to the defense.
April 13, 1993	The Harris/Weaver trial begins in federal court in Boise, Idaho before the Honorable Edward Lodge.

DATE	EVENT
April 13, 1993	The defense files an ex parte application for subpoenas duces tecum. Included among the requested subpoenas is one to FBI Inspector Miller to bring any and all records used by the Shooting Incident Review Team; other subpoenas requested the FBI and the Marshals Service to produce copies of certain manual provisions and personnel files.
April 14, 1993	Judge Lodge approved the defense ex parte application for subpoenas duces tecum.
b5/b7C b6 [ ]	[ ]
April 20, 1993	Government informant Fadeley reveals on cross examination that he was expecting a monetary award following his work on the Weaver case.
April 21, 1993	Defense moves to strike the testimony of Fadeley arguing that he was a contingent fee witness.
April 23, 1993	Defense files a motion to hold the government in contempt or to compel it to produce the personnel files and manual provisions subpoenaed on April 14. Later that day, the USAO files a motion for a protective order.
b5 April 23-May 3, 1993	The court recessed the trial. On April 24, Howen interviews Captain David Neal [ ] of the Idaho State Police CRT, who rescued the marshals late on August 21, 1992.
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DATE	EVENT
[redacted]	[redacted]
May 12, 1993	USAO files Henthorn certificates for the personnel files of Horiuchi, Roderick, Cooper and Degan.
May 17, 1993	Judge Lodge denies the motion to strike the Fadeley testimony.
May 20, 1993	Special Agent Calley finds additional notes of the Cooper interview and the draft FD-302 in his desk.
May 21, 1993	Howen advises the court and defense counsel that, three weeks earlier, he had interviewed David Neal, the Idaho Police Captain who rescued the marshals on August 21st, and that during this interview Neal indicated that it was his impression from a statement made by Deputy Marshal Roderick that Roderick fired the first shot. The court calls a recess to give the defense the opportunity to interview Neal.
	Howen informs the court and the defense of the notes FBI Special Agent Calley found in his desk drawer. These notes related to the August 1992 interviews of Deputy Marshal Cooper and appeared to contradict Cooper's trial testimony about critical events. Howen produces the notes to the defense.
[redacted]	[redacted]
[redacted]	[redacted]

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DATE	EVENT
May 25, 1993	Howen discloses to the court the circumstances surrounding the taking of the L series photographs and produces additional search photographs, some of which appear to be pictures of the L bullets before being removed.
June 4, 1993	HRT sniper Lon Horiuchi completes his testimony. Documents responsive to the April 13, 1993 defense subpoenas to the FBI and that were mailed by the FBI on May 21, 1993, are received at the U.S. Attorney's Office. Judge Lodge calls action "totally inexcusable."
June 9, 1993	Judge Lodge fines the government $3240 for failing to comply with the courts discovery order to produce materials in a timely manner and orders that Lon Horiuchi be returned for further questioning.
June 11, 1993	Judge Lodge dismisses two counts of the ten count indictment (Count Six charged violations of 18 U.S.C. §§ 2 and 111, and Count Eight charged a violation of 18 U.S.C. § 922(g)(2)) in the indictment for lack of evidence.
June 16, 1993	Jury deliberations begin on the 42nd day of the trial.
July 8, 1993	The jury acquits Weaver and Harris for the murder of Deputy Marshal Degan. Harris is also acquitted of all other charges against him. Weaver is convicted on Count Three (Failure to Appear, 18 U.S.C. § 3146(A)(1)) and Count Nine (Committing an Offense While on Release, 18 U.S.C. § 3147(1)) and found not guilty on all other counts. Weaver is incarcerated pending sentencing.
August 19-20, 1993	The Boundary County Sheriff's Office conducts a search of the vicinity around the Weaver cabin, including the "Y".

DATE	EVENT
October 18, 1993	Weaver is sentenced to 18 months incarceration, three years probation and receives a $10,000 fine upon conviction for failure to appear and committing an offense while on release
October 26, 1993	Judge Lodge issues an order imposing a $1920 fine against the FBI. This fine represented the attorney fees paid to defense counsel when Horiuchi had to be called back to testify because of the untimely production of certain Shooting Incident Report materials. Judge Lodge was critical of the FBI's actions in producing discoverable materials.
December 18, 1993	Weaver is released from incarceration.

VII. IDENTIFICATION OF PARTICIPANTS[1766]

AYERS, Stephen M. — U.S. Magistrate Judge, U.S. District Court, Idaho. Judge Ayers handled the arraignment of Weaver on illegal weapons charges on January 18, 1991 and at that time scheduled Weaver's trial for February 19, 1991.

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BINNEY, David G. — Deputy Director, FBI and former Assistant Director, Inspection Division, FBI Headquarters, Washington, D.C. The Inspection Division conducted an investigation into the August 22, 1992 shooting at Ruby Ridge.

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BOYLE, Laurence — U.S. Magistrate Judge, U.S. District Court, Idaho. Judge Boyle conducted the preliminary hearing of Randy Weaver.

[1766] This list of persons does not identify each individual mentioned in the Report, but only those who were significantly involved with the issues discussed.

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BUTLER, Richard — A leader in the Aryan Nations.

BYERLY, Herbert G. — Special Agent, Bureau of Alcohol, Tobacco and Firearms ("BATF"). Agent Byerly investigated and submitted a case report to the U.S. Attorney's Office recommending the prosecution of Weaver for selling illegal guns. In addition he assisted in the trial preparation of the Weaver case.

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CALLEY, George — Special Agent, FBI, Boise, Idaho. Calley participated in the crime scene search at Ruby Ridge and the interviews of the marshals involved in the shooting incident on August 21, 1992.

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CLUFF, J. Bradley "Jack" — Senior Deputy, U.S. Marshals Service and Resident Officer, Moscow, Idaho. Conducted background investigation on Weaver for threat assessment.

COOPER, Larry T. — Deputy U.S. Marshal, U.S. Marshals Service, Jefferson City, Missouri. Member of the six-man team at Ruby Ridge on August 21, 1992 who was

involved in shooting incident at the "Y."

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DEGAN, William F. — Deputy U.S. Marshal, U.S. Marshals Service, Boston, Massachusetts. Killed in shootout at Ruby Ridge on August 21, 1992.

DILLON, T. Michael — Supervisory Senior Resident Agent, FBI, Boise, Idaho.

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ELLSWORTH, Maurice O. — U.S. Attorney for District of Idaho during investigation and prosecution of Weaver and Harris.

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EVANS, Ronald D. — Former Chief Deputy U.S. Marshal (retired), Boise, Idaho.

FACKLER, Dr. Martin — Contracted with government as forensic specialist in wound ballistics at trial of Weaver and Harris.

FADELEY, Kenneth — Former BATF informant who bought two sawed-off shotguns from Randy Weaver in 1989.

GLENN, Eugene F. — Special Agent in Charge, FBI, Salt Lake City, Utah. Senior FBI agent at Ruby Ridge following August 21 shooting.

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GOW, W. Douglas — FBI Associate Deputy Director, Investigations, FBI Headquarters. Participated in FBI Headquarters decisions regarding operational plan after shooting incident at Ruby Ridge on August 21, 1992.

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b7C GRIDER, William [ ] [ ] Bill Grider relayed messages to and from Marshals Service and the Weavers during the Spring 1991 regarding surrender negotiations.

GRITZ, James Gordon "Bo" — Retired Green Beret and presidential candidate. Nongovernment negotiator brought in to negotiate the surrender of Weaver and Harris at Ruby Ridge.

GROVER, Cyrus — Visual Information Specialist, FBI Laboratory, FBI Headquarters, Washington, D.C. Member of

Shooting Incident Review Team who measured distances at crime scene.

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HARRIS, Kevin — Harris was a member of the Weaver household and was involved in the shootout with Deputy U.S. Marshals on August 21, 1992. On August 22, 1992, Harris was wounded by shots fired by a member of FBI HRT. In July 1993, a jury acquitted Harris of all charges in connection with the killing of Deputy Marshal Degan.

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HAZEN, Lester B. — Special Agent, FBI HRT, (sniper/observer coordinator), Quantico, Virginia.

HOFFMEISTER, Everett — Attorney appointed by Magistrate Judge Ayers in January 1991 to represent Weaver on illegal weapons charges.

HORIUCHI, Lon T. — Sniper/observer, FBI, HRT, Quantico, Virginia. Member of Sierra 4 team at Ruby Ridge. He fired two shots on evening of August 22, 1992, that killed Vicki Weaver and wounded Randy Weaver and Kevin Harris.

HOWEN, Ronald D. — Assistant U.S. Attorney, District of Idaho. He was the lead attorney

in the prosecution of Randy Weaver and Kevin Harris. In addition, he represented the U.S. Attorney's Office during the investigation at Ruby Ridge after the shooting on August 21, 1992.

HUDSON, Henry — Acting Director of U.S. Marshals Service during the time that the U.S. Marshals Service was formulating plans to effect the arrest of Weaver on failure to appear charges after Weaver's failure to appear in February 1991. Hudson was confirmed as Director, in August, 1991 and approved the operational plan to proceed with "Operation Northern Exposure" prior to the shooting incident on August 21, 1992 at Ruby Ridge.

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HUMMEL, Terrance A. — Chief U.S. Probation Officer who notified court and U.S. Attorney's Office of letter from U.S. Parole Officer Richins to Randy Weaver which had included incorrect trial date.

HUNT, David — Senior Deputy U.S. Marshal, Boise, Idaho. Assisted with Weaver threat assessment profile and was a member of U.S. Marshal's Service team conducting surveillance of Weavers in the Spring of 1992. He was a member of Observation Post Team at Ruby Ridge when shooting incident occurred on August 21, 1992. He reported the incident to U.S. Marshals Service Headquarters and local law enforcement.

IMBROGNO, Cynthia — U.S. Magistrate Judge, Spokane, Washington. Judge Imbrogno conducted the initial appearance of Kevin Harris at a hospital in Spokane on September 2, 1992.

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JOHNSON, Michael — U.S. Marshal for the District of Idaho.

KAHL, Gordon — Head of a militant anti-tax group, the Posse Comitatus who was killed in shootout with U.S. Marshals in 1983.

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LANCELEY, Frederick W. — Former Supervisory Special Agent, FBI, Quantico, Virginia. Lead hostage negotiator at Ruby Ridge.

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LINDQUIST, Kim — Assistant U.S. Attorney, District of Idaho. Lindquist participated with Assistant U.S. Attorney Howen in the prosecution of Randy Weaver and Kevin Harris.

LODGE, Edward J. — Judge, U.S. District Court, Boise, Idaho, who presided over the trial of Weaver and Harris.

LOVE, Roger — Sniper/observer, FBI, HRT, Quantico, Virginia. Member of Sierra 1 team at Ruby Ridge.

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MATHEWS, Robert — Founder of a white supremacist group called "The Order" who was killed during a 35-hour standoff at a house on Whidbey Island, Washington, in December 1984. He was quoted in a letter from Vicki Weaver to U.S. Attorney's Office, Boise, Idaho, in February 1991.

MAYS, Warren — Deputy U.S. Marshal, Boise, Idaho. Mays prepared a threat assessment of Vicki Weaver as the result of two letters she sent to the U.S. Attorney's Office in February, 1991.

McGAVIN, Stephen P. — Supervisory Special Agent, Deputy Commander, FBI HRT, Quantico, Virginia.

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MILLER, Thomas W. — Assistant Special Agent in Charge FBI, Louisville who headed Inspection Team from the Inspection Division which investigated the August 22 shooting by the HRT at

Ruby Ridge and prepared a report of the shooting incident.

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NEAL, David L. — Commander of the Idaho State Police Critical Response Team ("CRT") who led CRT group to rescue marshals from Ruby Ridge after shooting incident on August 21, 1992.

NEVIN, David Z. — Attorney, Boise, Idaho. Nevin was defense counsel for Kevin Harris.

NORRIS, Frank — Deputy U.S. Marshal, Tactical Medic, Headquarters. He was selected by U.S. Marshals Service team leader Roderick to go to Ruby Ridge in mid-August, 1992 for future reconnaissance of Weaver property. Member of Observation Post team at Ruby Ridge on August 21, 1992 when shooting incident occurred.

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PETERSON, Charles F. — Attorney, Boise, Idaho. Peterson was defense counsel for Randy Weaver.

POTTS, Larry A. — Assistant Director, Criminal Investigation Division, FBI Headquarters. Chief FBI representative involved in formulating response to shooting incident at Ruby Ridge on August 21, 1992 who made decision to deploy HRT.

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b7C **RAMPTON, Gregory** — Special Agent, FBI, Boise, Idaho. Rampton and [redacted] were assigned as the FBI case agents assigned to the investigation and prosecution of the Weaver/Harris case.

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RICHINS, Karl L. — U.S. Probation Officer who sent a letter to Weaver on February 7, 1991 that erroneously noted that the trial date was March 20, 1991 rather than February 20, 1991.

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[redacted]

RODERICK, Arthur — Branch Chief, Enforcement Division U.S. Marshals Service, Headquarters. Headed team of marshals responsible for conducting surveillance of Weaver property and developed plan to effect arrest of Randy Weaver. Member of reconnaissance team who was involved in shooting incident on August 21, 1994.

ROGERS, Richard — Commander of FBI HRT. Primary architect of the Rules of Engagement adopted at Ruby Ridge crisis.

RYAN, Harold — Chief Judge, U.S. District Court for the District of Idaho. Judge Ryan issued a bench warrant charging Randy Weaver with failure to appear on February 20, 1991.

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SMITH, G. Wayne "Duke" — U.S. Marshals Service, Associate Director for Operations. Travelled with FBI HRT from Quantico, Virginia to Ruby Ridge in August 1992 and consulted with the FBI on formulating Rules of Engagement. Represented U.S. Marshals Service Headquarters at Ruby Ridge throughout efforts to effect arrest of Weaver and Harris.

SPENCE, Gerald R. (Gerry) — Attorney, Jackson Hole, Wyoming. Spence was defense counsel for Randy Weaver.

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TAISTER, Michael — Visual Information Specialist, FBI Laboratory, FBI Headquarters, Washington, D.C. Member of Shooting Incident Review Team, who measured distances at crime scene.

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THOMAS, Joe — Member of the Observation Post unit of the six-man U.S. Marshals Service team at Ruby Ridge on August 21, 1992.

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WAGES, Larry B.

Special Agent, FBI, El Paso, Texas. Wages was one of the first FBI agents at Ruby Ridge after the shooting incident on August 21, 1992. Wages was assigned search responsibilities during the initial search of the "Y" and directed later searches of the "Y".

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WEAVER, Randy

Moved his family from Iowa to Boundary County, Idaho in 1983. His failure to appear for trial on illegal weapons charges in February 1991 led to efforts by the U.S. Marshals Service to effect his arrest. On August 21, 1992 he was involved in the shootout with a team of Deputy U.S. Marshals wherein his son Sammy and Deputy Marshal Degan were killed. On August 22, 1992 he was shot and wounded by shots fired by FBI HRT

member Horiuchi. Weaver surrendered to the FBI on August 31, 1992. A jury acquitted Weaver of conspiracy, murder and other charges, but found him guilty of failure to appear and one other count. He was sentenced to 18 months in prison and was released from incarceration on December 18, 1993.

WEAVER, Samuel — 13-year-old son of Randy and Vicki Weaver. Died in shootout with Deputy U.S. Marshals at Ruby Ridge on August 21, 1992.

WEAVER, Sara — 16-year-old daughter of Randy and Vicki Weaver.

WEAVER, Vicki — Wife of Randy Weaver who died as the result of shots fired by FBI HRT member Horiuchi on August 22, 1992.

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WHITTAKER, Bruce — Boundary County Sheriff. His office investigated complaints that Weaver had stolen property and threatened neighbors with violence. He coordinated local law enforcement efforts after the shooting incident on August 21, 1992.

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WILLIAMS, Mikel H. — U.S. Magistrate Judge, Boise, Idaho. Judge Williams conducted the preliminary hearing for Kevin Harris in September 1992.